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THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

THE
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THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: GENERAL PRINCIPLES AND SUBSTANTIVE LAW

By G. G. FITZMAURICE, C.M.G.
Second Legal Adviser to the Foreign Office

Purposes and Limits of the Present Study. ALTHOUGH the International Court of Justice has, in comparison with its predecessor, the Permanent Court of International Justice, only been in existence for a short time, and has not had the opportunity of pronouncing upon more than a relatively small number of cases, it has nevertheless produced a considerable volume of authority on points of general interest to international lawyers. It is the purpose of the present study to call attention to the existence of this body of statements of principle, by extracting and assembling in classified form, and with such comment as may be necessary to explain their bearing and effect in the context in which they were made, all the conclusions and findings of the Court (and, within certain limits, of individual Judges) presenting features of general interest from the standpoint of international law and procedure. It follows that the object is both a specialized and a limited one: in particular, it is not the intention to give an account of, or to comment on, the cases *as such* with which the Court has been called upon to deal. So far as the present study goes, these cases are the framework within which the Court has made general statements of principle. A good deal will naturally emerge as to the actual decisions in the cases themselves, but this will be incidental. Frequently, the decision or opinion of a judicial tribunal has no interest except in relation to the particular facts of the case. What is of *general* interest is the underlying principle: the immediate decision or opinion itself may turn simply on how that principle is to be applied to the circumstances of the case, or to the terms of the treaty provision under consideration.

Separate and Dissenting Opinions. Although the primary object of this study is to present the views of the Court itself, a good deal of prominence is given to the separate or dissenting opinions of individual Judges. These play a valuable part in the functioning of the Court,[1] and to ignore them would be to give but an incomplete portrayal of its work as a whole, as well as to disregard material of primary importance from the standpoint of the present study; for although dissenting Judges differ from the Court as to the actual conclusion, they may well, in the course of so doing, make general statements or explanations of principle which are in themselves not in any way inconsistent with the views of the Court, but merely differently applied to the facts. Again, a Judge who delivers a separate but not dissenting opinion, agrees with the conclusion of the Court, but for different reasons, or prefers to give his own reasoning. His views clearly form a valuable supplement to those of the Court. Finally, even where the views of an individual Judge are definitely contrary to those of the Court, on matters of principle, it may be desirable to quote them, because it is often the case, particularly with difficult or controversial questions, that a decision can only properly be appreciated in the light of a contrary view. However, since the object of the present study is purely expository and not evaluatory, still less critical, such views are quoted and discussed only for that purpose.

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[1] Apart from their intrinsic merits, they act as a foil to the views of the Court, and, being the work of (as a rule) a single hand, have a character and individuality which cannot be expected of decisions or opinions embodying the combined views of some ten or twelve Judges. While doubtless the most satisfactory decision from the point of view of the particular case is a single unanimous decision, this would often present less of interest to the lawyer than a decision embodying a substantial majority view, accompanied by a few separate or dissenting opinions.

Arrangement. The ensuing study is divided into three main parts: The first deals with points of substantive (general) international law. The second is devoted to the interpretation of treaties—a constant theme of the work of the Courts. The third is concerned with the law and procedure of international organizations and tribunals. For reasons of space it is only possible to deal with these three parts in successive issues of this *Year Book*. It is hoped that after three years the accumulation of further material will enable each of these divisions of the subject to be dealt with in rotation in further issues of this *Year Book* as a permanent feature.[1] The first part, to which the present article is devoted, is subdivided into two chapters on (1) general principles of international law and sources of law, and (2) particular topics of international law.[2]

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[1] This scheme has been suggested by the Editor.

[2] For the general lines of this arrangement, with certain variations that seemed called for by the present material, the author is indebted to the articles on the work of the former Permanent Court by Sir Eric Beckett, K.C., K.C.M.G., principal legal adviser to the Foreign Office, which appeared in the *British Year Book of International Law* for 1930, and in the *Recueil des Cours* of the Hague Academy of International Law for 1932 and 1935. The author would also like to express his indebtedness to Sir Eric Beckett for a number of the ideas underlying certain of the generalizations formulated in the present study, particularly in the sections on State Responsibility, Maritime Law, Treaty Interpretation, Domestic Jurisdiction, Evidence and Proof, and Damages. However, for the particular expression given to these generalizations the author is alone responsible.

FIRST PART

SUBSTANTIVE INTERNATIONAL LAW

CHAPTER I

GENERAL PRINCIPLES, SOURCES OF LAW, AND DEFINITIONS OF TERMS

DIVISION A: GENERAL PRINCIPLES

§ 1. NATURE OF A LEGAL QUESTION. In the (*First*) and (*Second*) *Admissions* cases,[1] the Court, without attempting to define generally what a legal question consisted of, indicated that questions of interpretation were necessarily and always legal questions, irrespective of the motives for which the interpretation was required:[2]

> 'To determine the meaning of a treaty provision . . . is a problem of interpretation *and consequently a legal question.*'

Again:[3]

> 'The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake *an essentially judicial task*, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request. . . .'[4]

It follows from this that a question remains a legal question notwithstanding that the consequences its determination produces may lie in the political field.

§ 2. INTERNATIONAL PERSONALITY. In the *Injuries* case[5] the Court, in finding that the United Nations Organization possessed international personality, confirmed the principle that it is not States alone which possess such personality, and that entities other than States may possess it. The Court also gave some indication of what international personality involves:[6]

> 'The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.'

Then, after reviewing the factors which, in their view, necessitated the attribution of international personality to the United Nations *qua* organization (a question discussed in the chapter on international organizations to be published in the *Year Book* for 1952), the Court concluded:[1]

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[1] The two Advisory Opinions on the conditions and procedure for the admission of new Members to the United Nations.

[2] *I.C.J.*, 1948, 61: This slightly abbreviated form of the official form of reference '*I.C.J. Reports*, 19—, p. —' will be used in the present study. The Court's Reports appear seriatim in annual volumes with the pages consecutively numbered throughout the volume.

[3] Ibid.

[4] (Italics added). See also reaffirmation in *I.C.J.*, 1950, 6–7.

[5] The Advisory Opinion on reparation for injuries to United Nations servants.

[6] *I.C.J.*, 1949, 178.

> 'Accordingly the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, and that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon the international plane. *What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.*' (Italics added.)

§ 3. General Principles of Good Conduct in the Interrelations of States. Under this head the following points may be noted:

(*a*) *Respect for the rights of other States*: sic utere tuo ut alienum non laedas. This principle was affirmed by the Court in the *Corfu* case (Merits),[2] with particular reference to the responsibility of States for what takes place within their jurisdiction. In finding that the Albanian authorities were under an obligation to notify or give warning of the presence of a minefield in their waters (knowledge of which must in the circumstances be imputed to them), the Court stated as one of the grounds on which this obligation was based:[3]

> '. . . every State's obligation not to allow knowingly[4] its territory to be used for acts contrary to the rights of other States'.[5]

(*b*) *Obligation to act in accordance with elementary considerations of humanity*. The Court in the same case and connexion also gave as a ground of obligation[6]

> '. . . elementary considerations of humanity, even more exacting in peace than in war. . . .'

These two *dicta* suggest the existence of a 'good neighbour' principle underlying international law and forming the source of obligations that have neither been expressly assumed nor arise from any specific rule of international law. Two consequences may be noticed:

(i) *The fact that a State is not a party to a particular Convention containing an express obligation does not mean that it may not be subject to a similar obligation on other grounds*. In the *Corfu* case, the point was that a specific obligation to notify the presence of a minefield is contained in Hague Convention No. VIII of 1907, but this Convention applies prima facie to war conditions, and Albania was in any case not a party to it. She was nevertheless held to be subject to a similar obligation, on the grounds already noticed.

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[1] *I.C.J.*, 1949, 179.

[2] The claim brought by the United Kingdom against Albania for damage caused to British vessels by an unnotified minefield in Albanian waters.

[3] Loc. cit. 22.

[4] The obligation is therefore not absolute—see footnote 1 on next page.

[5] *I.C.J.*, 1949, 22.

[6] Ibid.

(ii) *A State may be responsible for an omission, not merely to prevent an unlawful act, but also to avert the consequences of that act, if, as a result of the omission, damage is sustained by another State in the course of a lawful activity by it.* This is particularly the case where the State inculpated had the last opportunity of avoiding the damage, by reason of knowledge in its possession which it failed to impart to the other State. In the *Corfu* case, it was found that Albania did not herself lay the mines, but that she must have known they had been laid, and that although possessed of such knowledge in time to give due warning, she failed to do so. For the damage resulting from this omission she was therefore held to be responsible.[1]

(*c*) *Intervention. Self-help. Duty to respect the territorial sovereignty of other States.* In the *Corfu* case (Merits), the Court used language which can be read as a condemnation of all intervention involving the use or display of force, and as a rejection of the view that self-help (from which, however, self-defence must be distinguished) can ever be a legitimate means of redressing international wrongs. On the other hand, given the context,[2] and the fact that most authorities on international law are agreed in admitting the legitimacy of intervention and self-help in certain cases, a possible view would be that the Court's finding only related to the actual intervention involved in the *Corfu* case. The language used stressed the necessity for respecting the territorial sovereignty of other States, as being the essential foundation of international relations. It was as follows:[3]

> 'The Court can only regard the alleged right of intervention[4] as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.'

---

[1] It is, naturally, not every omission that gives rise to international responsibility, nor every occurrence taking place within its jurisdiction that a government can be presumed to have knowledge of. These points were made clear in the *Corfu* case, and are dealt with elsewhere in the present study (see for instance § 2 of Chapter II).

[2] The intervention in question was the act of the United Kingdom Government in sending naval ships into Albanian waters to sweep up the minefield which, as was subsequently proved before the Court, had caused the damage to the two British ships involved, and after attempts to secure Albanian co-operation had failed. The United Kingdom Government's plea before the Court was that this action was justified, both as necessary in the interests of the safety of navigation and as a special application of the theory of intervention in order to secure evidence (in the shape of the mines) that would otherwise have been liable to be lost or destroyed to the detriment of the administration of international justice.

[3] *I.C.J.*, 1949, 35.

[4] The phrase 'the alleged right of intervention' could mean all intervention generally, *qua* alleged right; or it could mean the particular right of intervention alleged by the United Kingdom to exist in the circumstances of the *Corfu* case. In the context the meaning seems to incline to the latter. The paragraph concerned follows immediately on a passage setting out the United Kingdom Argument and itself begins with the words: 'The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention . . . ' &c. (as quoted above).

As regards the plea of self-help, the Court said it could not accept this defence either:[1]

> 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government's complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.[2]

§ 4. REPARATION FOR INTERNATIONAL WRONGS. Under this head three points may be noted:

(*a*) *General liability to make reparation for breaches of international obligations.* In the *Injuries* case the Court[3] expressly reaffirmed, and cited, the statement of the former Permanent Court of International Justice in the *Chorzów Factory* case[4] that

> 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.

Essentially the same point is involved in the statement of the Court in the *Peace Treaties* case (2nd Phase)[5] that

> '. . . refusal to fulfil a treaty obligation involves international responsibility . . .',

for the notion of international responsibility would be devoid of content if it did not involve a liability to 'make reparation in an adequate form'. While these statements were made specifically with reference to breaches of international *engagements*,[6] they would appear to be applicable to all forms of international legal wrongs, since treaties and other contractual engagements are merely a particular form of international obligation, and there is in principle no reason why breaches of them should entail *general* consequences that breaches of other international obligations (e.g. those arising from basic rules of international law) do not: indeed, breaches of basic rules of law give rise to an obligation to make reparation no less than do breaches of treaties and other contractual engagements.

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[1] *I.C.J.*, 1949, 35.

[2] These passages may be compared with the language used by the former Permanent Court in the *Lotus* case (Series A, No. 10, at p. 18) on an analogous point:

> 'The first and foremost restriction imposed by international law upon a State is that, *failing the existence of a permissive rule to the contrary*, it may not exercise its power in any form in the territory of another State.' (Italics added.)

It is difficult to suppose that the Court in the *Corfu* case meant, by the generality of its language, to indicate that, in its opinion, there were in fact *no* permissive rules to the contrary, and what it said must probably be read as subject to a qualification similar to that made in the *Lotus* case.

[3] *I.C.J.*, 1949, 184.

[4] Series A, No. 9, p. 21.

[5] *I.C.J.*, 1950, 228. This was the Advisory Opinion on whether Bulgaria, Hungary and Roumania were under an obligation to submit certain disputes which had arisen under the Peace Treaties to arbitration.

[6] The passage from the judgment of the Permanent Court in the *Chorzów Factory* case was cited by the (present) Court in connexion with breaches by Members of the United Nations of their obligations towards the Organization, either under the Charter or arising 'by necessary intendment out of the Charter' (ibid.).

(*b*) *A State is not absolved from responsibility for failure to carry out an international obligation by reason of the fact that such failure renders impossible the execution of the process contemplated by the obligation.* In the *Peace Treaties* case, the Court, having found (1st Phase) that the Governments of Bulgaria, Hungary, and Roumania were 'under an obligation to appoint their representatives to the Treaty Commissions',[1] nevertheless found (2nd Phase) that the failure to make these appointments (wrongful though it was) rendered the constitution of the Commissions in the manner contemplated by the Peace Treaties impossible. The Court, however, stressed the fact that this did not absolve the Governments concerned from international responsibility for their failure to appoint their Commissioners. They had been guilty of a breach of treaty, and 'it is clear that refusal to fulfil a treaty obligation involves international responsibility'.[2]

(*c*) Per contra, *the fact that a State has failed to carry out an international obligation, thereby incurring international responsibility, does not mean that a remedy for the failure can be found in the substitution of a different process for the one which the failure has rendered impossible of execution.* In the *Peace Treaties* case (2nd Phase), the Court was asked whether, despite the failure of the Governments of Bulgaria, Hungary, and Roumania to appoint their representatives to the Treaty Commissions, these Commissions could nevertheless be constituted, if necessary without those representatives. The Court found[3] that they could not, broadly on the ground that in the circumstances the essential conditions contemplated by the Treaties for the setting up of the Commissions (namely co-operation on the part of all concerned) were wanting:

> 'These conditions are not present in this case, and their absence is not made good by the fact that it is due to the breach of a treaty obligation.'

The Court went on:[4]

> 'The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties.[5] It is the duty of the Court to interpret the Treaties not to revise them.'

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[1] *I.C.J.*, 1950, 228.

[2] Ibid.

[3] Loc. cit. 228–9.

[4] Ibid.

[5] In this passage the Court seems to have overlooked the fact that the designation of the 'third' or neutral member of the Commissions by the Secretary-General of the United Nations would not *necessarily* have resulted in two-member instead of three-member Commissions, since it would still have been open to the ex-enemy Governments concerned to appoint their Commissioners. However, this does not affect the basic ground for the Court's Opinion, namely that, in their view, the conditions contemplated by the Treaties for the setting up of the Commissions were lacking.

Generalized, the principle involved might be stated as follows: that where a particular process is contemplated for achieving a given result, whether in consequence of a treaty obligation or of an obligation arising from a general rule of international law, the result in question cannot properly be arrived at by substituting a different process for the one contemplated, even though it is due to the default of one of the parties subject to the obligation that the regular process cannot be employed.

§ 5. A CLAIM OF RIGHTS INVOLVES SUBMISSION TO THE CORRESPONDING OBLIGATIONS. This principle was applied by the Court in the *South-West Africa* case.[1] After stating that the authority which the Government of the Union of South Africa exercised over the territory of South-West Africa was based on the Mandate granted to the Union by the former League of Nations, the Court went on:[2]

> 'If the Mandate lapsed, as the Union Government contends, the latter's authority would equally have lapsed. To retain the rights derived from the Mandate and to deny the obligations thereunder could not be justified.'

§ 6. STATUS AND CONTRACT.

(*a*) *Constitutive, legislative, and contractual instruments. Real and personal rights and obligations.* Although the point was not perhaps very explicitly stated in the opinion of the Court itself,[3] the *South-West Africa* case is authority for the proposition that certain types of international régimes or systems, while having their origin in instruments contractual in form, are not themselves of a contractual character but rather have, or acquire, an essentially objective, self-contained character, a status independent of the instrument that created them, so that their existence is not affected[4] by the lapse of that instrument,[5] material changes in its terms, or the disappearance of one of the parties to it. In coming to the conclusion that the status of South-West Africa as a territory under Mandate had not been affected by the demise of the League, which was a party to the Mandate, or by the lapse of the League Covenant (under Article 22 of which the Mandates system was set up), the Court[6] rejected the contention advanced on behalf of the Union of South Africa that the Mandate had lapsed because the League had ceased to exist. This contention, it held, was based on a misconception of the legal situation created by the Mandate. The

[1] In this case the Court gave an Advisory Opinion as to whether South-West Africa was still under Mandate and what the obligations of the Union of South Africa were in respect of the territory.

[2] *I.C.J.*, 1950, 133.

[3] The point emerges more explicitly from the separate but concurring opinions of Judges McNair and Read.

[4] But although the *existence* of the régime or system is not affected, its *incidents* may be.

[5] This does not mean that such régimes last for ever, but they must be *brought* to an end in some specific way: they do not automatically end *by reason of* the lapse of the original constituent instrument.

[6] *I.C.J.*, 1950, 132.

Mandate was created in the interest of the inhabitants of the territory and of humanity in general 'as an international institution with an international object'. It was not therefore possible to draw any conclusion by analogy from domestic law concepts of a mandate or trust. The rules regulating the Mandate constituted 'an international status' for the territory of South-West Africa.[1] As regards the obligations under the Mandate, therefore:[2]

> 'Since their fulfilment did not depend on the existence of the League of Nations, they could not be brought to an end merely because this supervisory organ ceased to exist. Nor could the right of the population to have the Territory administered in accordance with these rules depend thereon.'

Judge McNair made the same point in the form of a contrast between rights and obligations *in rem*, good for and against all the world, created by international instruments of the constitutive type, and obligations *in personam* of a purely contractual character as between the particular States parties to them:[3]

> 'From time to time it happens that a group of great Powers or a large number of States, both great and small, assume a power to create by multipartite treaty some new international régime or status which soon acquires a degree of acceptance or durability extending beyond the limits of the actual contracting parties, and giving it an objective existence.'

Thus the actual instrument creating the régime or status may be the work of only a small number of countries; yet by reason of its character, the régime or status set up by it may become both binding on, and available for the benefit of, all the other States of the international community, even if they never were and never become parties to the constitutive instrument. In this connexion Judge McNair cited the following passage from the report of the Commission of Jurists set up to advise the Council of the League of Nations on the demilitarization of the Åaland Islands:[4]

> 'The Powers have, on many occasions since 1815, and especially at the conclusion of peace treaties, tried to create true objective law, a real political status, the effects of which are felt outside the immediate circle of contracting parties.'[5]

In further illustration of the same point, Judge McNair[6] cited a passage from the American case of *Chirac* v. *Chirac* (1817, 2 Wheaton 259, 277) where Chief Justice Marshall said that this type of right

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[1] Examples of such régimes or systems, other than Mandates and Trusteeships, are territories such as the Åaland Islands invested with a status of permanent neutralization or demilitarization; international waterways such as the Danube, the Dardanelles and Bosphorus, the Suez and Panama Canals, which are subject to a permanent régime of freedom of navigation and passage; areas such as the basin of the Congo under a permanent régime of freedom of commerce.

[2] *I.C.J.*, 1950, 133.

[3] Loc. cit. 153.

[4] Loc. cit. 153–4.

[5] The special reference to Peace Treaties in this passage supports the view put forward by the present writer on another occasion that Peace Treaties frequently have a constitutive as well as a purely contractual character and that this may explain certain apparent anomalies in their structure and effect ('The Juridical Clauses of the Peace Treaties', pp. 5–6 and 106–7, in *Académie de Droit International, Recueil des Cours*, 1949).

[6] Loc. cit. 157.

> '. . . once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty or any other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right.'[1]

In application of these principles, and after reviewing the characteristics of a Mandate, Judge McNair concluded:[2]

> 'In short, the Mandate created a status for South-West Africa . . . this status—valid *in rem*—supplies the element of permanence which would enable the legal condition of the Territory to survive the disappearance of the League, even if there were no surviving personal obligations between the Union and other former Members of the League. "Real" rights created by an international agreement have a greater degree of permanence than personal rights, because these rights acquire an objective existence which is more resistant . . . to the dislocating effects of international events.'

(*b*) *Obligations requiring for their performance by one party the existence of another party or entity, and those not so requiring*. Judge McNair made the same principles the basis of a distinction between those obligations which do, and those which do not, require and assume for their performance the continued existence of a particular party or entity. An obligation to treat the inhabitants of a Mandated Territory in a certain way did not involve any such requirement; consequently it was not affected by the dissolution of the League *per se*. On the other hand, the administrative supervision by the Council of the League had lapsed

> 'because the League and its Council and Permanent Mandate Commission—the organs which were designated (i) to receive the reports, (ii) to be satisfied with them, and (iii) to examine and advise upon them—no longer exist, so that it has become impossible to perform this obligation'.[3]

§ 7. PLACE OF PRINCIPLES OF DOMESTIC LAW IN THE INTERNATIONAL FIELD. Judge McNair in the *South-West Africa* case asked[4] what was the duty of an international tribunal when confronted with a new legal institution, the object and terminology of which were reminiscent of the rules and institutions of private law, and to what extent it was useful or necessary to examine what appeared to be the relevant analogies in private law systems. He went on to say[1] that—

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[1] This citation was one of a number made by Judge McNair from cases decided by national courts. These illustrate the fact that, used with due regard to the difference in the field of application, the decisions of national courts may form a useful source of rules and principles valid also in the international sphere. (As to the safeguards to be employed, see § 7 below.)

[2] *I.C.J.*, 1950, 155–6.

[3] The Court did not take the view that the reporting obligations of the Union of South Africa no longer existed, but this was not because they disagreed with the particular principle here enunciated by Judge McNair. It was because the Court took the view (which Judge McNair did not take) that the functions of the League in this matter had devolved by automatic succession on to the United Nations. Consequently, in the Court's view, an authority did exist which could discharge these functions, and therefore the obligations of the Union had not become impossible of performance and had consequently not lapsed. This was not a disagreement on the necessity for the existence of a party, but on whether a party in fact existed.

[4] *I.C.J.*, 1950, 148.

> 'International law has recruited, and continues to recruit many of its rules and institutions from private systems of law'.

He pointed out that Article 38 (1) (*c*) of the Statute of the Court expressly authorized the Court to apply 'the general principles of law recognised by civilised nations'. But, he said, the way to do this was not to import ready-made into international law, private law institutions 'lock, stock and barrel', just as they were. 'It would be difficult to reconcile such a process with the application of "the general principles of law".' In his view, therefore, the duty of international tribunals in this matter was[2] to—

> '. . . regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions'.

§ 8. SOVEREIGNTY. In speaking of sovereignty in relation to mandated territories in the *South-West Africa* case, Judge McNair used words which are authority for the view that the sovereignty over a territory can be in abeyance, capable of reviving in certain events but temporarily latent:[3]

> 'Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the mandates, sovereignty will revive and vest in the new State.'

He went on to point out that the important practical question in this and other similar cases was not where the theoretical sovereignty lay, but in what entity the right to administer was vested, and what were its rights and duties:

> 'What matters in considering this new institution is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it.'

§ 9. WHERE THERE IS A RULE OR PRINCIPLE OF LAW, ALLEGED RESTRICTIONS ON IT CANNOT BE PRESUMED BUT MUST BE ESTABLISHED. This was affirmed in the joint dissenting Opinion of Judges Basdevant, Winiarski, McNair, and Read in the (*First*) *Admissions* case as follows:[4]

> '. . . when confronted with a rule or principle of law . . . no restriction on it can be presumed, unless it has been clearly established, and . . . in case of doubt it is the rule or principle of law which must prevail.'[5]

[1] *I.C.J.*, 1950, 148.

[2] Ibid.

[3] *I.C.J.*, 1951, 150.

[4] *I.C.J.*, 1948, 86.

[5] There is no reason to think the Court would have disagreed with this proposition *as such*. It did not agree that the particular rule or principle of law involved was what the jointly dissenting

§ 10. STATES AND GOVERNMENTS CANNOT PROFIT FROM THEIR OWN WRONG OR PLEAD THEIR OWN DEFAULT AS AN ARGUMENT IN SUPPORT OF A CONTENTION THEY ARE PUTTING FORWARD. This principle, which was affirmed by the former Permanent Court, was reaffirmed by Judge Read in the *Peace Treaties* case (2nd Phase) as follows:[1]

> 'Accordingly, I think I am bound to take into account the fact that, in the existing circumstances and under existing international law, a defaulting government could not object to the competence of such a tribunal. If it raised the objection before such a Treaty Commission, it [sc. the Commission] would be bound to apply existing international law and refuse to let such a government profit from its own wrong. If it raised the objection in proceedings before this Court, it would be necessary for the International Court of Justice, which is not a law making organ, to apply existing principles and recognise that it [sc. the defaulting government] was estopped from alleging its own treaty violation in support of its own contention. It is impossible for me, acting as a judge in advisory procedure, to raise [sc. allow] this objection, which the defaulting government itself would be prevented from raising in any proceedings which recognised the principles of justice.
>
> 'There can be no doubt as to the law on this point. It was settled by the Permanent Court in Judgment No. 8: Series A, No. 9, the *Factory at Chorzów* (Claim for Indemnity) (Jurisdiction) at page 31. No reasons have been submitted . . . on which any distinction in principle between the two cases could be based or which would justify the rejection of the legal principles adopted and applied in that case.'

While the Court's approach in the *Peace Treaties* case was such that, for it, the question of applying the principle thus affirmed by Judge Read did not arise, there is no reason to suppose that, purely as a principle, the Court would not endorse it.

§ 11. ABUSE OF RIGHTS. The doctrine of abuse of rights, arising from the failure of States or governments to exercise their rights in good faith and with due regard to the consequences of such exercise, has not been affirmed by the Court.[2] It does, however, figure prominently in a number of the separate or dissenting judgments and opinions, and although the doctrine cannot be regarded as definitely established, or as constituting an accepted principle of international law, the matter is of sufficient interest to make it worth while quoting some of the passages concerned. The essence of the doctrine is that although a State may have a strict right to act in a particular way, it must not exercise this right in such a manner as to constitute an abuse of it; it must exercise its rights in good faith and with a sense of responsibility; it must have *bona fide* reasons for what it does, and not act

Judges thought it was; alternatively the Court would have regarded certain restrictions on it as being in fact established. The disagreement was not therefore on the principle but on its application to the case.

[1] *I.C.J.*, 1950, 244.

[2] The Court did, however, in the (*First*) *Admissions* case make an indirect application of the doctrine when it said (*I.C.J.*, 1948, 63) that Article 4 of the Charter did not forbid the taking into account of any factor which it was possible 'reasonably and in good faith' to connect with the conditions laid down in that article.

arbitrarily or capriciously. Some advocates of the doctrine would probably add as a corollary that where an admitted right is exercised in an abusive way, the act must be regarded as void or invalid: alternatively, that it becomes legitimate to employ courses that might not otherwise be justified, in order to nullify it or its effects. The matter arose principally in relation to the use of the veto for preventing the admission of new Members to the United Nations. In the (*First*) *Admissions* case, the jointly dissenting Judges (Basdevant, Winiarski, McNair, and Read), without specifically endorsing the doctrine of abuse of rights, affirmed the obligation of States to act in good faith:[1]

> 'While the Members of the United Nations have thus the right and the duty to take into account all the political considerations which are in their opinion relevant to a decision whether or not to admit an application for membership or to postpone its admission,[2] it must be remembered that there is an overriding legal obligation resting upon every Member of the United Nations, to act in good faith (an obligation which moreover is enjoined by paragraph 2 of Article 2 of the Charter) and with a view to carrying out the Purposes and Principles of the United Nations. . . .'

And again:[3]

> 'That does not mean that the freedom thus entrusted to the Members of the United Nations is unlimited or that their discretion is arbitrary.'

A little later, the jointly dissenting Judges again stated that Members were 'legally bound' to have regard to the principle of good faith, and concluded as follows:[4]

> 'Nevertheless, as we have said, a Member of the United Nations does not enjoy unlimited freedom in the choice of the political considerations that may induce it to refuse or postpone its vote in favour of the admission of a State. . . . It must use this power in good faith in accordance with the Purposes and Principles of the Organisation and in such a manner as not to involve any breach of the Charter.'

A similar view, on identical grounds, was also expressed by Judge Zoričić in the same case[5] and, in a somewhat different form, by Judge Azevedo.[6] The most positive statement of the doctrine of abuse of rights, as such, was, however, made by Judge Alvarez in the *Corfu* case (Merits). He said:[7]

> 'Formerly the *misuse of a right* had no place in law. Anyone could exercise his rights to their fullest extent, even if the effect was prejudicial to others; in such cases there was no duty to make reparation. . . .'
>
> 'I consider that in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law. For in that law

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[1] *I.C.J.*, 1948, 91–2.

[2] It will be remembered that the Court itself did not take the view that Members might take all relevant political considerations into account. The Court considered that questions of admission must be determined on the basis of the specific criteria mentioned in Article 4, paragraph 1 of the Charter, and on those alone.

[3] Ibid.

[4] Loc. cit. 93.

[5] Loc. cit. 103.

[6] Loc. cit. 80.

[7] *I.C.J.*, 1949, 47.

> the unlimited exercise of a right by a State, as a consequence of its absolute sovereignty, may sometimes cause disturbances or even conflicts which are a danger tc peace. . . .'
>
> 'In this matter there are two questions to be determined: (*a*) when is there an abuse of rights;[1] and (*b*) what should be the penalty. In regard to the former point, the facts must be evaluated in any given case; and in regard to the penalty, this may consist, according to the circumstances, of an apology, a rebuke or even compensation for the injury caused.'[2]

Judge Alvarez put forward the same view in very similar terms in the (*Second*) *Admissions* case.[3] In applying the doctrine to the facts of that case, Judge Alvarez suggested that since the primary role of the Security Council was the preservation of peace and security, and the 'veto' had been devised mainly because of the decisive part the five Permanent Members must necessarily play in matters of peace and security, its use in the case of matters not directly relating to peace and security, while it might be legal in the formal sense, was none the less an 'abuse of rights'. Therefore, in the matter of the admission of new Members, the Assembly could 'appraise' the use of the veto made in the Security Council, and if necessary disregard it:[4]

> 'Even if it is admitted that the right of veto may be exercised fully by the permanent members of the Security Council in regard to the recommendation of new members, the General Assembly may still determine whether or not this right has been *abused* and, if the answer is in the affirmative, it can proceed with the admission without any recommendation by the Council.'[5]

§ 12. OBLIGATIONS OWED TO THE INTERNATIONAL COMMUNITY AT LARGE, NOT TO ANY PARTICULAR STATE AS BENEFICIARY. In the *South-West Africa* case Judge Alvarez suggested[6] that there are cases in which States may be under an obligation '. . . without the beneficiary of the rights relating to these obligations being known. The beneficiary is the international community'. In one sense this could be regarded as true of all obligations arising out of general rules of international law; but even so there is usually an individual State, government, or entity to whom, in the given case, the particular obligation resulting from the general rule is owed. There might, however, be cases where this was not so. If, for instance, there is in certain circumstances a legal duty under the rules of general international law to recognize a new State or government, to whom is this duty owed in an actual case? Not, some would say, to the new State or government itself, for until it is recognized, which *ex hypothesi* it has not yet been, there is no recognition of the existence of an entity to whom any duty could be owed.[1] Nor, in the absence of special undertakings, would there be any such duty to any particular third State or government. Thus, on these hypotheses, if there is an obligation to recognize, it is not an obligation to any individual State or government, but to the international community at large.

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[1] Here Judge Alvarez draws attention to one of the main difficulties of the doctrine: where is the line to be drawn between a legitimate and an abusive exercise of rights?

[2] Any fruitful application of the doctrine of abuse of rights (which, it must be repeated, is still quite unsettled as a matter of international law) would normally require a different type of remedy, something which would enable the act complained of as constituting an abuse to be as it were disregarded or treated as void and its effects to be nullified. Judge Alvarez himself recognized this in the (*Second*) *Admissions* case.

[3] *I.C.J.*, 1950, 15.

[4] *I.C.J.*, 1950, 20.

[5] This passage is cited solely in order to illustrate the doctrine of abuse of rights as advanced by Judge Alvarez and others. The Court itself in the (*Second*) *Admissions* case did not agree with the conclusion suggested: it considered that the consent of the Security Council, as well as of the Assembly, was necessary for the admission of a new Member and that (*I.C.J.*, 1950, 10):

> '. . . nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote in the Security Council'.

The Court further held (loc. cit. 7) that the question put to it, as formulated, assumed that a motion for the admission of a new Member which was 'vetoed' by one of the Permanent Members resulted in the non-existence of a recommendation, and that the Court was therefore not called upon to examine whether such a veto was effective to defeat a motion which would otherwise have been adopted as having obtained the votes of seven or more Members of the Council.

[6] *I.C.J.*, 1950, 177.

§ 13. RELATIONSHIP OF REGIONAL SYSTEMS OF INTERNATIONAL LAW TO GENERAL INTERNATIONAL LAW. In the *Asylum* case Judge Alvarez[2] gave an interesting general description of 'American International Law' as applied between the States of the Pan-American Union. As regards the scope of such law he suggested that

> 'American international law is binding upon the States of the New World; it is also binding upon the States of other continents in matters affecting America, such as immigration, the Security zone of the continent in time of war, etc.'

This statement is not altogether easy to reconcile with that made by the same judge a little later[3] that 'Such systems of law are not *subordinate* to universal international law, but *correlated* to it', since the only form of correlation that would involve a relationship and not a conflict would be one according to which regional systems are applicable to and binding in all relations between the States of the region concerned, but are not *per se* applicable to, or binding in, relations between those States and other States outside the system, though some or all of these other States might be willing to *accept* these rules, or certain of them, as applicable in their relations with the States of the system. It would seem, therefore, that the second of these two propositions of Judge Alvarez is the one which most nearly represents the correct position, unless the first can be read as subject to the implied qualification in relation to the States of 'other continents' that they shall have accepted this position. This may have been Judge Alvarez's intention (see below, § 5 of Division B of this Chapter). A clear statement of the position was made by Judge Read in the same case when he said[1] that American international law was

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[1] The correctness of certain assumptions implicit in this view would not be universally admitted, but the object here is merely to illustrate a general proposition, not to argue for or against any particular theory of recognition.

[2] *I.C.J.*, 1950, 293–4. The *Asylum* case was a litigation by Peru against Colombia in respect of shelter afforded to a Peruvian political refugee by the Colombian Embassy in Peru.

[3] Loc. cit. 294.

> '. . . a body of conventional and customary law complementary to universal international law, and governing inter-State relations in the Pan-American world'.

§ 14. METHOD OF TERMINATION OF LEGAL RELATIONSHIPS. In the *South-West Africa* case, Judge Read[2] stated it to be 'a general principle of law recognised by civilized nations' that

> 'Any legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination.'

This may sound a truism, but it is in fact a point that often comes up in connexion with treaties, constitutions, or other systems of legal relationships that do not make any express provision for their termination, and which are so framed as to suggest that the possibility of their termination was not contemplated by the parties and was perhaps purposely not provided for. The natural corollary to the above proposition is that systems of legal relationships of this quasi-permanent type, and whose termination is not brought about by the operation of any general rule of law, can *only* be terminated by general consent. This emerges from another *dictum* by Judge Read in the *South-West Africa* case (see next section).

§ 15. RES INTER ALIOS ACTA. PACTA TERTIIS NEC NOCENT NEC PROSUNT. Pointing out that membership of the United Nations was not coextensive with membership of the former League of Nations, and that the Charter could not of itself affect or destroy the rights of former Members of the League who had not become Members of the United Nations, Judge Read said in the *South-West Africa* case:[3]

> 'It is a principle of international law that the parties to a multilateral treaty, regardless of their number or importance, cannot prejudice the legal rights of other States. The United Nations, by signing and ratifying the Charter, could and did establish the *competence* of the Organisation to perform functions in relation to Mandated territories. They could not, in law, transfer functions from the League to the Organisation without the consent and authority of the League, or of Members of the League whose legal rights would thus be impaired. Consequently, while the Charter had come into force and the organisation of the United Nations had come into being before the dissolution of the League, the legal rights of many States which were not members of the new Organisation, as regards the mandated territories, including South West Africa, remained in full force and vigour.'

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[1] *I.C.J.*, 1950, 316.

[2] Loc. cit. 167.

[3] Loc. cit. 165.

In a later passage,[1] Judge Read added:

> '. . . no provisions of the Charter could legally affect an institution founded upon the Covenant, or impair or extinguish legal rights and interests of those Members of the League which are not members of the United Nations.'

From this two maxims might be drawn:

1. It is irrelevant that the great majority of the countries, parties to a given pact, have subsequently agreed amongst themselves on something different. The rights of the minority under the old pact remain unimpaired. The new pact only applies as between those who are parties to it. Those who are not, can continue to claim fulfilment of the provisions of the old.[2]

2. No international agreement, however important, has *absolute* precedence over another. A new pact can only prevail over an existing one in the relations between those who subscribe to the new pact. It cannot prevail over the old in the relations between the parties to the new and parties to the old pact which have not become parties to the new.[3]

DIVISION B: SOURCES OF LAW

§ 1. CONSIDERATIONS OF HUMANITY. In the *Corfu* case (Merits), the Court gave as one of the grounds creating a legal obligation for a State to act in a certain way, the 'elementary considerations of humanity'. This matter is sufficiently discussed under § 3 (*b*) of Division A above.[4]

§ 2. CUSTOM AS A SOURCE OF LAW. *Must be Constant and Uniform and Accepted as Law.* In the *Asylum* case, the Court made some interesting general observations as to the circumstances in which the existence of an alleged custom can be relied upon as creating a rule of law:[5]

> 'The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other party . . . that the rule invoked . . . is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law".'

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[1] Loc. cit. 172.

[2] This assumes the type of pact, of which there are many examples, which is not open to denunciation by the parties individually, and which can only be brought to an end by the agreement of all the parties. When general consent to this cannot be obtained, it frequently happens that a greater or smaller number of the parties agree on something different for application *inter se*. It is then that the above-mentioned principles come into play.

[3] Thus even the Charter of the United Nations, which by virtue of Article 103 has absolute precedence over the obligations of Member States under other international instruments, can only have it in the relations between those States.

[4] It should be noted, however, that all the implications of this view—i.e. in exactly what circumstances and to what extent considerations of humanity give rise in *themselves* to obligations of a legal character—remain to be worked out.

[5] *I.C.J.*, 1950, 276–7.

This was followed by an indication of the circumstances in which no custom constituting a rule of law could be said to exist:[1]

> 'The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law. . . .'[2]

§ 3. ANALOGY. In the *Injuries* case, the Court suggested caution in using the analogy of one rule of law as creating, or as evidence of, another; or perhaps, more accurately, in applying to a new or different situation a rule traditional to another situation:[3]

> 'Nor does the analogy of the traditional rule of diplomatic protection of nationals abroad justify in itself an affirmative reply. It is not possible by a strained use of the concept of allegiance to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organisation on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.'

In the same case Judge Badawi Pasha, while dissenting on a number of points, was in agreement with the Court on the use of analogy and went even further:[4]

> '. . . this argument . . . is in any case only an argument by analogy in favour of an affirmative reply, and draws its elements from the new situation, from the identity of the basic principle of the situations compared. . . .
>
> 'But in international law, recourse to analogy should only be had with reserve and circumspection. Contrary to what is the case in municipal law, and precisely owing to the principle of State sovereignty, the use of analogy has never been a customary technique in international law.'

§ 4. RULES OF DOMESTIC OR NATIONAL LAW. In the *South-West Africa* case, the Court, while refusing to regard the principles of the private law institution of *mandatum* as applicable by way of analogy to international Mandates, on account of the different purpose and character of the latter, in no way rejected private law as a source of principles applicable in the international field; and Judge McNair in his separate but (on this part of the case) concurring Opinion, drew attention to the provisions of subparagraph (*c*) of Article 38 (i) of the Statute of the Court, which authorized the Court to apply 'the general principles of law recognized by civilized nations'. Because the reference was to 'general principles' it would not, in his view, be right to import private law rules 'ready made' into international law: they should rather be regarded as indications of principle, but, subject to that, international law had recruited and continued to recruit many of its rules and institutions from private systems of law (see above, Division A, § 7). Then, after citing certain general principles common to all private law institutions in the nature of trusts, *curatio* or *tutelle*, he concluded:[1]

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[1] *I.C.J.*, 1950, 277.

[2] These observations were not actually made with reference to the institution of diplomatic asylum as such, but as regards a particular aspect of it, namely the right to 'qualify' the offence (as to which see below, Chapter II, § 5 (*e*)).

[3] *I.C.J.*, 1949, 182.

[4] Loc. cit. 211.

> 'These are some of the general principles of private law which throw light upon this new institution [i.e. of international trusts in the nature of Mandates or Trusteeships], and I am convinced that in its future development the [sc. private] law governing the trust is a source from which much can be derived.'

§ 5. REGIONAL SYSTEMS OF INTERNATIONAL LAW AS A SOURCE OF RULES OF GENERAL OR UNIVERSAL INTERNATIONAL LAW. (See also above, Division A, § 13.) There would appear, prima facie, to be no reason why a rule, in its origin peculiar to a regional system of international law, and applicable only as between States subscribing to that system, should not pass into general international law provided it is universally accepted as such.[2] This view appears to be implicit in the following observation made by Judge Alvarez in the *Asylum* case:[3]

> 'American international law has exercised a considerable influence over universal international law . . . many concepts or doctrines of American origin *have achieved or tend to achieve universal acceptance*.' (Italics added.)

CHAPTER II

PARTICULAR TOPICS OF INTERNATIONAL LAW

§ 1. SUCCESSION AND DEVOLUTION. The Court and certain of the individual Judges had some interesting observations to make on this subject in the *South-West Africa* case, but as they related principally to the case of succession or devolution as between international organizations, rather than as between States, the matter is more conveniently dealt with in the chapter on international organizations.[4]

§ 2. RESPONSIBILITY OF STATES.

(*a*) *General Responsibility of States for what occurs in their territory. No absolute liability.* In the *Corfu* case (Merits) the Court, as already noticed (see previous Chapter, § 3 of Division A), affirmed the general responsibility of a State for acts injurious to the rights of another State occurring in its territory *with the knowledge of the authorities, or in circumstances where such knowledge must be presumed to have existed.* On the other hand, the Court equally held, in effect, that a State cannot be held responsible for all acts occurring in its territory, *merely* by reason of their occurrence there. In other words it rejected the doctrine of 'absolute risk' or liability. This result derives from the fact that the Court considered knowledge to be necessary, but held that it could not be imputed from the mere fact that the act complained of took place within the jurisdiction of the State. Speaking of Albania's responsibility for damage caused by an unauthorized and unnotified minefield in her waters, the Court said:[1]

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[1] *I.C.J.*, 1950, 149.

[2] It may of course be argued, where there is room for doubt as to what the correct rule of general international law is, that some rule regionally applied represents the correct rule, but that is a different matter.

[3] *I.C.J.*, 1950, 294.

[4] In the third part of this study, to be published in this *Year Book* for 1952.

> 'It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British ships were the victims . . . it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.'[2]

It was therefore necessary to establish knowledge, though this could be done by means of 'inferences of fact provided that they leave no room for reasonable doubt'. On this basis the Court, after reviewing all the circumstances, came to the conclusion that the laying of the minefield 'could not have been accomplished without the knowledge of the Albanian Government'. The same basic idea as to the principle involved was expressed by Judge Krylov, though he took quite a different view as to the effect of the facts in the *Corfu* case. On the issue of principle Judge Krylov said:[3]

> 'The responsibility of a State in consequence of an international delinquency presupposes at the very least, *culpa* on the part of that State. One cannot found the international responsibility of a State on the argument that the fact of which the State is accused took place in its territory—terrestrial, maritime, or aerial. . . . One cannot transfer the theory of risk, which is developed in the municipal law of some States, into the domain of international law. In order to found the responsibility of the State, recourse must be had to the notion of *culpa*. I refer to the famous English author, Oppenheim. In his work on international law, he writes that the conception of international delinquency presumes that the State acted "wilfully and maliciously", or in cases of acts of omission "with culpable negligence" (Vol. 1, para. 154). Mr. Lauterpacht, the Editor of the 7th edition (1948), adds that one can discern among modern authors a definite tendency to reject the theory of absolute responsibility and to found the responsibility of States on the notion of *culpa* (p. 311).'

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[1] *I.C.J.*, 1949, 18.

[2] The Court held, however, that the peculiar position of a State in relation to its own territory laid it under a special duty in the matter of *accounting* for what happened there, and also involved, in favour of other States, certain relaxations as to the quantum and character of the proof necessary to establish given facts. These matters are dealt with in the chapter on international tribunals and procedure to be published in this *Year Book* for 1952.

[3] *I.C.J.*, 1949, 72.

(*b*) *The assertion of exclusive control over territory involves an obligation to use due diligence to ensure the safety of legitimate foreign interests.* Judge Winiarski who, on the points dealt with above, agreed with the Court,[1] went further in some respects. While equally rejecting the idea that States were under any absolute liability as regards all happenings in their territory, he evidently considered that, by reason of their assertion of exclusive jurisdiction over such territory, they were under a special duty to employ due care and diligence to protect legitimate foreign interests.[2] Judge Winiarski illustrated this point very vividly when he contrasted the objections and difficulties the Albanian Government had made (precisely on the basis of exclusivity of jurisdiction) at the passage of foreign warships through its waters (albeit these formed part of an international strait, as the Court found), with its disclaimer of responsibility for what occurred in those waters, because of alleged inability of watch over them. He went on:[3]

> '. . . it is not possible to proclaim one's rights as a territorial Power, to exalt and exaggerate them in such a way as to refuse to allow other States to use one's territorial waters, and at the same time to neglect the organization of one's public order and security services intended to guarantee to States allowed to use the navigable channel that minimum of security to which they are entitled according to the most modest international standard.'

In saying this Judge Winiarski was following the classic statement of the law given by M. Max Huber, himself a former president of the Permanent Court of International Justice, in the *Island of Palmas* award, cited by Judge Winiarski as follows:[4]

> 'Territorial sovereignty . . . involves the exclusive right to display the activities of the State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States. . . .'

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[1] Judge Winiarski's Opinion is styled 'dissenting' in the official report of the case, but in fact he dissented only on the quite separate and subordinate issue of the competence of the Court to assess the damages due to the United Kingdom. On the main issue of Albania's liability, his Opinion was in the nature of a separate but concurring Opinion. He reached the same conclusion as the Court, but preferred to base it on the view that the Albanian Government had failed to use due care and diligence to prevent the laying of the mines, rather than on an attribution of knowledge that the mines *had* been laid, coupled with a failure *then* to warn sea traffic that the minefield was there (which was the ground favoured by the Court). The difference between these two views is clearly one of emphasis rather than of substance.

[2] The principle involved might be formulated as follows: since foreign countries are, by reason of the exclusive jurisdiction asserted by the territorial State, precluded from asserting or protecting their own rights in the area, it therefore becomes specially incumbent on the territorial State to use all due diligence to protect those rights. Denial to the injured State of any right of self-help (see previous Chapter, subsection (*c*) of § 3 of Division A) would of course reinforce this view.

[3] *I.C.J.*, 1949, 56.

[4] Loc. cit. 53.

It should be noticed that there is no conflict between this principle and that noticed under sub-section (*a*) above. In every case, *culpa* must be established, directly or by inference, but the assertion of exclusive rights over territory involves a special duty to use due diligence to protect the rights of others, and a failure to use such diligence involves *culpa*.

(*c*) *Responsibility for omissions.* The classic doctrine on this subject was stated by Judge Winiarski in the *Corfu* case (Merits) as follows:[1]

> 'In international law, every State is responsible for an unlawful act, if it has committed that act, or has failed to take the necessary steps to prevent an unlawful act, or has omitted to take the necessary steps to detect and punish the authors of an unlawful act. Each of these omissions involves a State's responsibility in international law, just like the commission of the act itself.'

The *Corfu* case is also authority for the very important proposition that a State is responsible not merely for failure to prevent an unlawful act that could, by due diligence, have been avoided, *but also for failure to prevent the consequences of the act where the authorities both knew of it, or must be presumed to have known of it, and knew in time to avert those consequences had they taken action which it was their international duty to take in the circumstances.* This matter has been noticed in the previous Chapter (§ 3 of Division A). The Court after finding (see ibid., subsection (*a*)) both that Albania knew of the minelaying and knew in time to give warning, and was under an international duty to give it, concluded as follows:[2]

> 'In fact nothing was attempted by the Albanian authorities to prevent the disaster. These grave omissions involve the international responsibility of Albania.
>
> 'The Court therefore reaches the conclusion that Albania is responsible under international law for the explosions which occurred on October 22nd, 1946, in Albanian waters, and for the damage and loss of life which resulted from them, and that there is a duty upon Albania to pay compensation to the United Kingdom.'

(*d*) *Special responsibility for and duty to ensure the protection of members of a foreign public service.* In the *Injuries* case, Judge Badawi Pasha referred with apparent approval to the contention that there was an 'international obligation to ensure protection of a foreign public service', adding[3] that this was 'confirmed by several precedents derived from the application of Articles 88 and 362 of the Treaty of Versailles, from the diplomatic history of the concert of European Powers in the Cretan question, and from the Corfu affair of 1923 (Tellini affair)'. Two points may be noted:

(i) Any such duty is clearly more stringent than that normally involved in the protection of foreigners in the territory, and must derive from the fact that the territorial State has expressly agreed to receive the members of a foreign service in a public capacity, and that they are not present in the territory for their own purposes but as representing their governments, and by express consent of the local authority.

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[1] *I.C.J.*, 1949, 52.

[2] Loc. cit. 23.

[3] Loc. cit. 209.

(ii) The general nature of the finding of the Court in the *Injuries* case[1] warrants the view that, on broadly analogous grounds, any special duties in the foregoing sense which a State may owe to the members of the public service of another State, it would equally owe to the agents of an international organization present in its territory for the purposes of the organization.

§ 3. INTERNATIONAL CLAIMS. In the *Injuries* case, the Court dealt with the capacity of international organizations, such as the United Nations, to bring international claims, and their position in doing so. This is dealt with in the chapter on international organizations in the third part of the present study.[2] The Court, however, and some of the Judges who delivered dissenting opinions, made a number of observations material to the subject of international claims generally, and these are considered in the present section.

(*a*) *Competence or capacity to bring an international claim, and customary methods of doing so.* The Court defined this as follows:[3]

> 'Competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation and the settlement of claims. Among these methods may be mentioned protest, request for an enquiry, negotiation, and request for submission to an arbitral tribunal, or to the Court insofar as this may be authorized by the Statute.'

(*b*) *States are possessed of capacity to bring international claims.* The Court said:[4]

> 'This capacity certainly belongs to the State; a State can bring an international claim against another State. Such a claim takes the form of a claim between two political entities, equal in law, similar in form, and both the direct subjects of international law.'

(*c*) *The submission of an international claim to an international tribunal requires the consent of the parties to the dispute.* As to this the Court said[5] that claims were

> '. . . dealt with by means of negotiation and cannot, in the present state of the law as to international jurisdiction, be submitted to a tribunal, except with the consent of the States concerned'.

It need hardly be said that such consent does not always have to be given specially and *ad hoc* in each separate case. It may be given generally and in advance, as when a State has by adhering to the so-called 'optional clause' accepted the compulsory jurisdiction of the Court, or where the States concerned are parties to a treaty providing for the reference of disputes to an arbitral or judicial tribunal, and the claim arises under the treaty. This was made clear by the Court in another connexion (see sections on competence in the chapter on international tribunals in the third part of this study.)[1]

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[1] In the *Injuries* case the Court in effect found that an international organization was in broadly the same position as a State in regard to making claims for injuries caused to its servants in the performance of their duties.

[2] To be published in the 1952 issue of this *Year Book*.

[3] *I.C.J.*, 1949, 177.

[4] Ibid. The Court equally found that the United Nations *qua* organization possessed this capacity; but this is dealt with in the third part of the present study.

[5] Loc. cit. 178.

(*d*) *Theoretical foundation of claims by States in respect of injuries to their nationals. Nationality of claims.* Judge Badawi Pasha, in the *Injuries* case, considered that this foundation lay in an *identification* of the claimant State with its injured national. He said:[2]

> 'It is . . . by juridically identifying the national and his national State that the latter is deemed to have the right to bring an international claim for reparation due to the victim or to persons entitled through him.'

And again:[3]

> '. . . the protection which a State owes to its national[4] does not consist in a right . . . derived from the mere notion of protection; thanks to the additional help of an ingenious juridical theory, based on nationality, it [i.e. international law] has identified the State with its national, and . . . considers that reparation due to the latter forms the measure of reparation due to the State.'

A more traditional statement of the rule was given by Judge Hackworth,[5] who said:

> 'A claim by one State against another on account of an injury to a national of the claimant State is based on the theory that the State has been injured through injury to its national.'

It is this position which underlies the rule that the injured individual must be a national of the claimant State—a rule which the Court[6] referred to as 'the traditional rule that diplomatic protection is exercised by the national State'—for if the victim is not a national of the claimant State the latter has suffered no injury through him. The apparent exception to this rule which arises when persons are injured who, though not nationals of the claimant State, are in its service (so that the injury does cause damage to that State) was evidently not considered by Judge Hackworth to constitute a true exception. He said:[7]

> 'Aside from the special situation of protected persons under certain treaties[8] and

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[1] To be published in the 1952 issue of this *Year Book*.

[2] *I.C.J.*, 1949, 207.

[3] Loc. cit. 214.

[4] From the context, it would appear that Judge Badawi Pasha was not here really referring to any supposed right of the subject to receive protection, but to the right of his State to extend protection to him.

[5] Loc. cit. 202.

[6] Loc. cit. 181.

[7] Loc. cit. 202.

[8] It is generally agreed that *internationally* such persons rank as nationals (*ressortissants*) of the protecting State since it is only by this means that they can be given protection in the international sphere. Their own direct local sovereign *ex hypothesi* does not enjoy fully independent sovereign status, or conduct his own foreign relations, and therefore lacks the full international personality requisite for bringing claims in the international sphere.

> that of seamen and aliens serving in the armed forces,[1] all of whom are assimilated to the status of nationals, it is well settled that the right to protect is confined to nationals of the protecting State. If the private claimant is not a national of the State whose assistance is sought, the government of that State cannot properly sponsor the claim, nor is the respondent government under any legal duty to entertain it.'

Judge Badawi Pasha had a slightly different, though analogous, theory. He considered that the only exception to the traditional nationality rule occurred where there was a special agreement between the States concerned to dispense with it, and to permit or entertain claims on a different basis, and in support of this he cited the finding of the Permanent Court of International Justice in the *Panevezys–Saldutiskis Railway* case.[2] He then said, speaking of cases of foreigners serving in the ships or armed forces of a country not their own, that these cases

> '. . . seem to relate to the protection of the flag and of armed forces, in which case protection would extend to everyone in the ship or in the forces, independently of nationality. But it must be pointed out that as the condition of nationality is satisfied as regards the flag or the forces, its absence, in the case of one or more units or persons . . . may be held to be covered by a principle of the indivisibility of the flag or of the armed forces.'

All this seems to suggest that some reformulation is required of the traditional rule that the victim must be a national of the claimant State. The real foundation of every international claim by a given State is, and must be, the breach of an international obligation by the defendant State and the injury suffered by the claimant State in consequence of such breach. In the ordinary case of injury to a foreigner abroad, involving the responsibility of the local authorities, the injury to the claimant State resulting therefrom can only arise from the fact that the victim is a national of that State. But where there is some special feature, such as that the injured party was in the service of the claimant State, the latter may suffer damage even though the victim was not its national.[3] This seems to have been what the Court itself had in mind when it said[4] that

> '. . . even in inter-State relations, there are important exceptions to the rule [i.e. that

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[1] There is also the very common case of persons who are employed in the diplomatic or consular services of another country.

[2] Series A/B, No. 76, p. 16.

[3] But the measure of damages will be different. Where the claim is based on the nationality of the victim, the measure of the damage suffered by the claimant State is the totality of the damage caused to the victim himself, or through him to his dependents or his estate. Where service, and not nationality, is the basis of the claim, the damages recoverable by the State in whose service, but not whose national, the victim was, are necessarily limited, *so far as that State is concerned*, to those arising from the loss of his services. His *national* State may, however, well have a concurrent right to claim, in respect of the damage caused to the victim himself.

[4] *I.C.J.*, 1949, 181.

> only the national State can claim], for there are cases in which protection[1] may be exercised by a State on behalf of persons not having its nationality'.

Perhaps the simplest summary of the matter is to say that the rule that only the national State of the victim can bring a claim for an injury or illegality done to an individual abroad is based on the assumption that the claim is in respect of the damage caused to the victim himself, or through him to his dependents or estate, and that it is not in respect of any special and independent damage caused directly to the claimant State as such, e.g. by reason of the loss of his services.

(*e*) *Where a State brings a claim in respect of a wrong done to one of its nationals, the measure of the damages recoverable by that State* (*in the absence of any special additional damage caused directly to the State itself, as such*[2]), *is the personal damage caused to the injured party, or, through him, to his dependents or estate. But the fact that the damages are computed on a basis personal to the injured individual does not cause the claim to be any the less a claim by the State for an injury to itself in the person of its national.* Speaking of this type of claim, Judge Badawi Pasha said in the *Injuries* case:[3]

> 'International Law recognizes that the State has the right to claim reparation in respect of this damage, not because it considers that the State is the legal representative of the victim, but because it holds that the State is asserting its own right, the right which it has to ensure, in the person of its subjects, respect for the rules of international law.
>
> . . . .
>
> 'According to this theory, the State does not act as representative of its national, although it claims reparation for the damage suffered by him. *But the reparation that it claims for this injury possesses the international character of reparation due from one State to another.*' (Italics added.)

In support of these principles Judge Badawi quoted the classic statement of them made by the Permanent Court of International Justice in its Judgment in the *Chorzów Factory* case (Series A, No. 17, pp. 27–8). The practical importance of the point is mainly evident in regard to the right to control and deal with any sums paid by the defendant State to the claimant State in satisfaction of the claim, either voluntarily or in consequence of an arbitral award or judicial settlement. On the basis of the principles just noticed, this right clearly belongs to the claimant State itself, not to the injured party or his dependents or heirs; and if the claimant State is responsible or accountable either to the private parties concerned or to the defendant State for the manner in which it deals with or disposes of the sums involved, it can only be in the political and not in the juridical sense.[4]

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[1] In the case of, for example, employment of a national of one country in the diplomatic or consular service of another, there might be an actual right of *protection* as such. But complicated questions arise as to the exact circumstances in which, and against the authorities of what countries, such protection can be exercised, discussion of which would be out of place here.

[2] E.g., arising from service with that State.

[3] *I.C.J.*, 1949, 206–7.

[4] See for the same position under English law *Rustomjee* v. *The Queen* (1876), 1 Q.B.D. 487; 2 Q.B.D. 69 (C.A.), and *Civilian War Claimants Association Ltd.* v. *The King*, [1932] A.C. 14.

(*f*) *Master nationality rule.* This rule, one aspect of which is that in the case of persons of dual nationality, the nationality of whichever of the two States they happen to be in prevails during the period of their presence there, has as another aspect or corollary: that a State cannot protect its national against another State of which he is also the national, and cannot bring a claim against that State in respect of an injury or wrong done to him. In such a case the 'defendant' State has merely wronged or injured its own national. Therefore (apart from special cases coming under a Treaty or other international instrument, and some cases involving considerations of human rights) the injury or wrong is on the domestic, not the international, plane, and does not give rise to any international claim.[1] In the *Injuries* case[2] the Court referred to this matter as the

> '. . . ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national . . . '.[3]

(*g*) *Exhaustion of municipal remedies rule. Denial of justice.* This well-known rule of the law of international claims was reaffirmed by Judge Badawi Pasha in the *Injuries* case, where he said[4] that an

> '. . . action against the State responsible can only arise after [the injured party] has exhausted all municipal remedies, and has met with a denial of justice'.

§ 4. MARITIME LAW.

(*a*) *Right of innocent passage in peace-time through territorial waters forming part of an international strait.*[5] In the *Corfu* case (Merits) the Court affirmed this right in the following terms:[6]

> 'It is, in the opinion of the Court, generally recognised and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that this passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.'

(*b*) *However, in exceptional circumstances, a coastal State, though it cannot prohibit or require special authorization for such passage, may be justified in regulating it.* The Court referred to the situation which existed between Albania and Greece, both coastal States of the strait involved (the North

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[1] In all dealings between a State and a person who has its nationality, that nationality prevails and is master over any other he may possess. Therefore, for the purpose of any claim arising out of such dealings he has the nationality of the 'defendant' State alone.

[2] *I.C.J.*, 1949, 186.

[3] The Court held that this practice had no application in the *Injuries* case, but that was because the claimant was not a State but an international organization (see the chapters on international organizations in the third part of this study, to be published in this *Year Book* for 1952).

[4] Loc. cit. 215.

[5] The Court expressly declined to pronounce one way or the other on the question of passage through territorial waters not forming part of international straits, this not being necessary to their decision in the *Corfu* case.

[6] *I.C.J.*, 1949, 28.

Corfu Channel), including the fact that Greece considered herself technically at war with Albania, and had territorial claims on a part of Albanian territory bordering on the Channel, and continued:[1]

> 'The Court is of the opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage or in subjecting it to the requirement of special authorization.'

(*c*) *Definition of international straits.*

(i) *Connecting two parts of the high seas and used for international navigation.* The Court found[2] that

> '. . . the decisive criterion is its [i.e. the Strait's] geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation'.

(ii) *It is immaterial that the strait is not a necessary but only an alternative route between the two parts of the high seas concerned.*

> 'Nor can it be decisive that this Strait is not a necessary route between two parts of the high seas, but only an alternative passage between the Aegean and Adriatic Seas. It has nevertheless been a useful route for international maritime traffic.'[3]

These pronouncements as to the nature of an international strait have great practical importance, because the tests advanced by Albania in the *Corfu* case, i.e. the importance of the waterway, the nature and quantity of the traffic utilizing it, whether it is the only, or the principal, or a secondary, route, are all open to the objection that in many cases it would be impossible to know in advance of an actual decision by an international tribunal whether a given waterway had the character of an international strait or not, since it would depend on matters of opinion. The test applied by the Court is an objective one and makes for certainty. The other tests can of course also be applied as contributory factors, and in the *Corfu* case the Court clearly thought[4] that the Channel was used to an important extent. It also mentioned the fact that it constituted a frontier between Greece and Albania, and that part of it was wholly within the territorial waters of these States.

(*d*) *Nature of Innocent Passage.* The findings of the Court in the *Corfu* case would appear to warrant the following propositions, on the assumption that innocence means, prima facie, innocence *vis-à-vis* and with reference to the coastal state:

(i) Innocence depends primarily, though not exclusively, on the manner rather than the motive of the passage.

(ii) In order to be innocent, the passage need not be purely navigational, i.e. with the immediate object simply of passing from one place to another, in the geographical sense. It can have a political object, provided that object is justified.[1]

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[1] *I.C.J.*, 1949, 29.

[2] Loc. cit. 28.

[3] Ibid.

[4] Loc. cit. 29.

(iii) In particular, passage does not cease to be innocent merely because its purpose is to test or assert a right disputed or wrongfully denied by the coastal State.

(iv) Where a right of passage exists, States are not bound to refrain from exercising it because it is disputed and may be challenged or even resisted by the coastal State.

(v) In such circumstances, passage does not cease to be innocent because it constitutes or is accompanied by a demonstration of strength; still less because it is accompanied by precautionary measures designed to secure the safety of the vessel in case of an attempt to deny the passage, or designed to forestall or discourage such attempts.

(vi) On the other hand, although the motive of the passage may be political, the operation involved must consist of passage, or of movements or actions incidental to passage as such. To proceed to territorial waters forming part of an international strait for the purpose, not of passage as such, but of carrying out a naval operation there such as mine-sweeping, is not an exercise of the right of innocent passage, even though passage actually takes place.

These propositions seem to be warranted by the following observations made by the Court after referring to the Albanian contention that the passage was not innocent because it was 'not an ordinary passage but a political mission', that the ships' guns were trained and the crews at action stations, and that there was generally a display of force showing 'an intention to intimidate and not merely to pass'. The Court said:[2]

> 'It is shown by the Admiralty telegram of September 21st . . . that the object of sending warships through the Strait was not only to carry out a passage for purposes of navigation, but also to test Albania's attitude. As mentioned above, the Albanian Government, on May 15th, 1946, tried to impose by means of gunfire its view with regard to the passage. As the exchange of diplomatic notes did not lead to any clarification, the Government of the United Kingdom wanted to ascertain by other means whether the Albanian Government would maintain its illegal attitude and again impose its views by firing at passing ships. The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied. The Government of the United Kingdom was not bound to abstain from exercising its right of passage which the Albanian Government had illegally denied.

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[1] It is an inference from certain of the Court's observations, not quoted here, that if the motive were espionage, e.g. the observation of the coastal defences, the passage would not rank as innocent. But a merely *incidental* observation of coastal defences could not suffice to render non-innocent a passage not undertaken for that purpose.

[2] Loc. cit. 30.

> 'It remains therefore to consider whether the *manner* in which the passage was carried out was consistent with the principle of innocent passage. . . .'

The Court then considered the facts, particularly the position of the ships' guns which were proved to be in their normal peace-time positions and not loaded, and said:[1]

> 'In the light of this evidence, the Court cannot accept the Albanian contention that the position of the guns was inconsistent with the rules of innocent passage.'

As regards the admitted fact that the crews were at action stations, the Court considered[2] that

> 'In view of the firing from the Albanian battery on May 15th this *measure of precaution* cannot, in itself, be regarded as unreasonable'. (Italics added.)

Finally, the Court referred to the somewhat minatory effect of the passage of four warships 'one after another through this narrow channel, close to the Albanian coast, at a time of political tension in this region'. The Court considered[3] that the intention

> 'must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again on passing ships'.

Nevertheless the Court found[4] that

> 'Having regard . . . to all the circumstances of the case, as described above, the Court is unable to characterize these measures taken by the United Kingdom authorities as a violation of Albania's sovereignty.'

On the other hand, as already noticed (see previous Chapter, § 3 (*c*) of Division A), the Court found the subsequent mine-sweeping operation carried out by British naval vessels to constitute such a violation. In this connexion the Court[5] stated that the United Kingdom Government

> '. . . recognizes that the operation . . . could not be justified as the exercise of a right of innocent passage, and . . . that, in principle, international law does not allow a State to assemble a large number of warships in the territorial waters of another State and to carry out minesweeping in those waters'.

This passage suggests the correct basis for distinguishing the cases that come under principle (v) above, from those that come under (vi). At first sight the dividing line may not seem altogether clear. The naval State concerned is entitled to take precautions, and what could be more precautionary than to sweep up mines in the navigable channel? The test, however, put in its simplest form, would appear to be whether the mine-sweeping, or other defensive or precautionary operation, is incidental to the passage, or whether, on the other hand, the passage is merely incidental to carrying out the operation. It is conceived that it must be legitimate, in order to effect a given passage in itself lawful, and where the presence of a minefield is suspected, to carry out a mine-sweeping operation *as part of and incidental to the passage*. It is a different thing to send ships into another country's waters without its consent *for the express purpose* of sweeping up a minefield there. Reduced to its simplest terms, the difference is between an operation which is primarily passage, and one which is primarily mine-sweeping. Had British ships swept up the minefield in the process of passage, it seems doubtful whether their action in so doing could, in the circumstances, have been regarded as a violation of Albanian sovereignty. The Court was, however, certainly justified in finding on the facts that what was involved was an operation of mine-sweeping, *as such*, 'carried out under the protection of an important covering force composed of an aircraft carrier, cruisers and other war vessels' which 'remained throughout the operation at a certain distance to the west of the Channel. . . .'[1] Clearly this was not *passage through*, but *operation in*, foreign territorial waters.

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[1] *I.C.J.*, 1949, 31.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Loc. cit. 33–34.

§ 5. Diplomatic Asylum.[2]

(*a*) *Meaning of 'diplomatic' asylum. The right to grant it to be interpreted strictly*. In the *Asylum* case, the Court drew attention[3] to the distinction between 'diplomatic' asylum (where a person takes refuge locally in the premises of a foreign mission), and 'territorial' asylum (where refuge is taken in another *country*). In the latter, but not in the former case, a request for his surrender is a matter of extradition:

> 'In the case of extradition the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed,—a decision to grant him asylum in no way derogates from the authority of that State.
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> 'In the case of diplomatic asylum. The refugee is within the terriory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the

[1] The Court was at some pains to say (loc. cit. 35) that the British authorities 'could not be reproached for having employed an important covering force in a region where twice within a few months [their] ships had been the object of serious outrages'. The Court did 'not consider that the action of the British Navy was a demonstration of force for the purpose of exercising political pressure on Albania'. But although the use of the covering force was not therefore in itself open to criticism, it clearly had the effect, in the Court's view, of characterizing the operation it related to as not being merely one of passage.

[2] This matter was dealt with by the Court in the *Asylum* case, but the actual decision in that case and a great many of the detailed points of it turned entirely on the interpretation of the provisions of particular Conventions and their application to particular facts, and to that extent did not involve points of *general* legal interest. It would therefore be beyond the scope of the present article to describe or comment on this case as such. In the course of it, however, the Court and some of the individual Judges made a number of observations on the *general* nature and character of the institution of diplomatic asylum, and it is these which are treated of here.

[3] *I.C.J.*, 1950, 274–5.

jurisdiction[1] of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State.'

For these reasons, the Court considered that the right to grant diplomatic asylum must be viewed strictly and its legal basis clearly established:[2]

> 'Such a derogation from territorial sovereignty[3] cannot be recognized unless its legal basis is established in each individual case.'

(*b*) *Meaning of 'grant' of asylum. Continuing nature of the act. It involves the extension of 'protection', not merely physical shelter.* The Court said:[4]

> 'The grant of asylum is not an instantaneous act which terminates with the admission, at a given moment, of a refugee to an embassy or a legation. Any grant of asylum results in, and in consequence logically implies a state of protection; the asylum is granted as long as the continued presence of the refugee in the embassy prolongs this protection.'

The Court here took quite a different view from Judge Alvarez who said:[5]

> 'Asylum . . . is regarded as a consequence of the ex-territoriality of the premises on which it is granted and not as a diplomatic protection; it is consequently considered that such asylum in no way constitutes an intervention or a limitation of the sovereignty of the territorial State, but rather that it is the legitimate exercise of a prerogative.'

The importance of the view adopted by the Court as opposed to that favoured by Judge Alvarez[3] lies in this, that its consequence is to deny to the receiving mission the possibility of maintaining that it is not extending protection, as such, to the refugee, but merely permitting him to remain on the premises, and that it is solely from the inviolability of the premises that he derives his protection. The grant of asylum is, in fact, a continuing act, placing the refugee in a *state* of protection, for which the mission is responsible. The mission is 'protecting' him in the formal or diplomatic sense of the term, not merely sheltering him physically. It is an active not a passive process.

(*c*) *Is the institution of diplomatic asylum recognized as forming part of general or universal international law and if so, on what basis?* In the *Asylum* case the Court dealt with diplomatic asylum on the basis of Latin-American customary and conventional law,[6] i.e. for the purpose of that case, as a Latin-American institution. There are, however, passages recognizing the fact that cases of the legitimate grant of such asylum can and do occur elsewhere.[1] The main difference is that whereas the geographical, linguistic, cultural, and, to some extent, political homogeneity of the South-American continent, coupled with certain needs arising from the character of political events there, has permitted and indeed encouraged the development of a considerable body of customary and conventional law on the subject, this is not the case in other regions where the practice of diplomatic asylum is of comparatively rare and spasmodic occurrence. Outside Latin-America, therefore, it can scarcely be called an institution, and when it occurs it does so on a somewhat different legal basis. What this basis may be is suggested by the following passage from the Court's judgment, coupled with its reference to 'elementary considerations of humanity' in the *Corfu* case as a source of legal obligation[2] (see previous Chapter, § 3 (*b*) of Division A). In the *Asylum* case, the Court said that the urgency of the need for protection in any given case was one of the most important considerations involved:[3]

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[1] Strictly, from the *exercise* of such jurisdiction.

[2] *I.C.J.*, 1950, 275.

[3] Judge Alvarez (see passage quoted under (*b*)) did not think any derogation from sovereignty was involved, because no actual 'protection' was exercised. The refugee was merely permitted to remain on the premises, which were inviolable in any event, and his protection was an automatic consequence of that, rather than the overt act of the receiving mission.

[4] *I.C.J.*, 1950, 281.

[5] Loc. cit. 292.

[6] Because the dispute was between two South-American countries and turned largely on the meaning and effect of certain Latin-American Conventions on the right of asylum.

> '. . . the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee'.

The Court continued:[4]

> 'It has not been disputed by the Parties that asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population.'

That the Court considered the dictates of humanity to be the true legal basis (a conception including but transcending that of protection from mob violence) can reasonably be inferred from the interpretation it gave to the conception of 'urgent cases' as used in one of the relevant regional Conventions on asylum. It is true that the Court declined to regard as falling into the category of urgency (which alone justified the grant of asylum under the Convention in question) a case where asylum was only sought in a local foreign mission three months after the event (a local military rebellion) which had caused the seeker to become a fugitive, during which time he had been in hiding elsewhere in the country, and when the sole immediate reason for seeking the asylum was fear of arrest by the local authorities and not any instant danger to life or limb. At the same time the Court made it clear that a threat of mob violence was not the only occasion on which, as a matter of general principle, the dictates of humanity might justify the grant of asylum. After stating that, in principle, 'asylum cannot be opposed to the operation of justice', the Court made the following observation:[1]

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[1] Judge Badawi Pasha stated this in terms, but also referred to the different character of the cases occurring outside Latin-America. He said (loc. cit. 309):

> 'It results from the foregoing description of asylum that this institution has an aspect in South America which it has not elsewhere.'

Speaking of the reasons for this difference he said (ibid.):

> 'It is [the] frequency of revolutions combined with their character, causes and conditions, which has given asylum [sc. in South America] an object and a usefulness it does not seem to have elsewhere.'

Judge Alvarez also (loc. cit. 292) referred to the practice of diplomatic asylum in Europe. He, however, thought the legal right to grant it was *confined* to the case of political offences, a view clearly not held by the Court.

[2] The question is not of any obligation to *grant* asylum, but of how far considerations of humanity create a *right* to grant it, and an obligation to recognize that right.

[3] *I.C.J.*, 1950, 282.

[4] Ibid.

> 'An exception to this rule can only occur if, in the guise of justice, arbitrary action is substituted for the rule of law. *Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims.* Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.' (Italics added.)

The importance of this pronouncement needs no emphasis in view of the fact that the danger run by those accused of political offences often arises much less from mob violence than from the threat of extra-legal action by the local authorities or from the subordination of the local courts to political direction; and that a political offence may consist of nothing more than political opposition to the local government. However, the Court went on to indicate the limits of this doctrine:

> 'On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of an immunity. . . .'

Furthermore, the Court in a later passage[2] denied that there was any legal presumption

> '. . . either in the course of revolutionary events, or in the more or less troubled times that follow . . . that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of states. . . .'

While the basis of distinction is thus clear, it is evident that its application in particular cases may be very difficult, especially where action of an essentially arbitrary character is carried out with an apparent observance of all the forms of justice, and ostensibly through the medium of the ordinary processes of the law. Nevertheless the Court has rendered a service by clarifying the principle involved in language capable of application to specific cases wherever they may arise, and on the basis of general rules that can be regarded as forming part of universal international law. Judge Read reinforced the conclusion to be derived from the pronouncements of the Court, that the general[3] right to grant diplomatic asylum cannot be limited solely to cases of danger from mob violence, by pointing out that this would give the political offender no better position than a person accused of an ordinary common crime.[1]

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[1] *I.C.J.*, 1950, 284.

[2] Loc. cit. 286.

[3] It was on the particular application of the doctrine to the circumstances of the case that Judge Read differed from the Court.

> 'An interpretation[2] limiting the grant of asylum . . . to cases in which political offenders were pursued by angry mobs, coupled with the duty to turn the fugitive over to the local police to be prosecuted for his political offence, would put the political offender on exactly the same footing as a common criminal. It is conceded that the latter can be given temporary shelter from mob violence or lynch law, on humanitarian grounds, and handed over to the local police for prosecution.'

Judge Read was in effect here postulating the existence of a special right to grant diplomatic asylum to political offenders, whereas the Court did not go so far as that.[3] But the difference was more one of emphasis than of substance, for the truth is that the necessity for protection against the arbitrary action of the local authorities (which the Court found was a good ground for granting asylum) arises, in practice, mainly with reference to cases of a political character. However, such a position is certainly capable of arising in the case of a common crime.[4] It would seem preferable, therefore, not to set up any special rule of asylum for political offenders as such, but to keep the matter on the purely general basis suggested by the Court, i.e. that there is a general right to grant asylum on humanitarian grounds irrespective of the nature of the offence; the exercise of this right depends on circumstances, but the humanitarian basis covers protection against the arbitrary action of the local authorities as well as protection from mob violence. As to what constitutes arbitrary action, it has already been noticed that the Court considered this must be confined to extra-legal steps, or measures involving a corruption of the administration of justice for political reasons. It is of course possible to take the view (which, however, was clearly not the Court's) that in political cases there is an inherent tendency to, or probability of, arbitrary action on the part of the local authorities and courts, justifying the grant of asylum automatically to all political refugees. This was the view taken by Judge Azevedo who said[5] that asylum

> '. . . applies not only to political offenders, properly speaking, but also . . . all political

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[1] Loc. cit. 323.

[2] Judge Read was actually referring here to an article in a Convention, but the point is clearly of general application.

[3] The Court did indeed discuss the case of asylum granted to political offenders, and whether the particular instance before it was a case of a political offence or not. But this was because one of the Conventions the Court had to apply forbade the granting of asylum to persons accused of or condemned for common crimes. No limitation of this character exists *as such*, however, under the general rules of international law, and the passages quoted above from the judgment of the Court are not consistent with the view that it does.

[4] It is only necessary to recall the cases where distinctions of colour, race, or religion have made the fair trial of even ordinary offenders impossible, and have rendered them liable to the most arbitrary treatment at the hands of the regular authorities.

[5] *I.C.J.*, 1950, 334.

opponents are protected. . . . Its exclusive, if not its principal, purpose is not to protect the refugee from the excesses of a mob. . . . The purpose of asylum is not only to protect life, but especially to safe-guard liberty against every kind of persecution.'

Judge Azevedo then continued with the following important passage:[1]

> 'Its purpose is not only to prevent the application of ad hoc legislation by exceptional courts, *but also to protect the refugee against ordinary justice*, in cases of political offences which, by their very nature, do not lend themselves to judicial appreciation and are sometimes referred to political organs following a procedure of "impeachment". *Extradition of political offenders is refused the world over, even when requested by countries living under a normal constitutional régime.*' (Italics added.)

Consequently, Judge Azevedo considered (in a later passage[2]) that

> '. . . the purpose of asylum . . . is not only to protect the person of the refugee, but also *to remove him from the jurisdiction of territorial Courts for political offences, just as in the case of refusal of extradition*'. (Italics added.)

The point Judge Azevedo was here making, is that since it is admitted that countries can, as of right, refuse *extradition* for political offences irrespective of the standards of justice in the requesting State, they can grant diplomatic asylum on the same basis. The reason why the Court disagreed with this point of view was that, as already noticed (subsection (*a*) above), it drew a distinction between territorial and diplomatic asylum, between a request for extradition in the former case and a demand for surrender in the latter. Diplomatic asylum involved prima facie a derogation from local sovereignty, which territorial asylum did not. It must therefore be viewed strictly, and its application must be confined to cases where a clear legal basis for it existed.

(*d*) *Meaning of the term 'Political Offence'*. The Court itself attempted no general definition of this term in the *Asylum* case, and contented itself with finding that the offences involved in that case had not been established to be common crimes.[3] The Court did, however, indicate that, prima facie, participation in a rebellion did not of itself constitute a common crime.[4] Judge Alvarez, however, defined a political offence as follows:[5]

> 'It may be said that any act which purports to overthrow the domestic political order of a country must be regarded as a political offence; in that sense even murder may sometimes be termed a political offence. This consequently also applies to military rebellion.'

(*e*) *To whom belongs the right to 'qualify' the offence, i.e. to say whether it falls into the category of a political offence or of a common crime, whether the case is one of urgency or not, etc.* In the *Asylum* case a large part of the issue turned on whether this right belonged *exclusively* to the State whose diplomatic mission had given asylum to the refugee. The Court thought not. The Judges who dissented on this point did so mainly on the ground that unless such an exclusive competence existed, the right of asylum would be largely illusory, since the territorial authorities will nearly always contend that the circumstances do not justify the grant. The Court considered that the head of the receiving mission certainly had a prima facie right to qualify the offence, though not an exclusive right: indeed he had a duty to do so:[1]

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[1] *I.C.J.*, 1950, 334.

[2] Loc. cit. 339.

[3] This negative finding sufficed for the purposes of the case, since the relative Convention merely prohibited the grant of asylum to persons accused of, or condemned for, common crimes.

[4] *I.C.J.*, 1950, 282.

[5] Loc. cit. 298.

> 'He must in fact examine the question whether the conditions required for granting asylum are fulfilled.'

This faculty, however, did not affect the right of the territorial State also to put forward its view:[2]

> 'The territorial State would not thereby be deprived of its right to contest the qualification. In case of disagreement between the two States, a dispute would arise which might be settled by the methods provided by the Parties for the settlement of their disputes.'

Thus the receiving State had no exclusive competence 'to qualify the nature of the offence by a unilateral and binding decision':[3]

> '. . . the principles of international law do not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum'.

On account of its view that the grant of diplomatic asylum involved a derogation from local sovereignty (see (*a*) above) and that the right must therefore be viewed strictly, the Court declined to admit that an exclusive competence to qualify on the part of the receiving State was in any way an inherent part of the institution of diplomatic asylum:[4]

> 'A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; *it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum.* This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum.' (Italics added.)

That the right of asylum is not rendered illusory by the absence of an exclusive right to qualify seems clear from the fact that (as the above *dicta* show) this in no way precludes the head of the receiving mission from exercising his judgment as he thinks best *at the moment of admitting* the refugee. The issue is one which arises subsequently, on the question whether he should be retained, expelled, or surrendered. For this reason, there does not seem to have been much difference between the practical effect of the Court's views and those of the dissenting Judges on this point.

[1] *I.C.J.*, 1950, 274.

[2] Ibid.

[3] Ibid.

[4] Loc. cit. 275.

Judge Alvarez in particular[1] seems to have agreed with the Court's view that although the receiving State had the right to qualify in the first instance, this right was not exclusive or unquestionable. It could be questioned by the territorial State, and if agreement could not be reached the matter must be submitted to arbitration or judicial settlement.

(*f*) *Right of the receiving mission to require a safe conduct for the refugee.* The Court found that while it was very usual for a safe conduct out of the country to be requested on behalf of persons taking asylum in foreign missions, there was no absolute right to require it:[2]

> 'There exists undoubtedly a practice whereby the diplomatic representative who grants asylum immediately requests a safe-conduct without awaiting a request from the territorial State for the departure of the refugee. This procedure meets certain requirements: the diplomatic agent is naturally desirous that the presence of the refugee on his premises should not be prolonged; and the government of the country, for its part, desires in a great number of cases that its political opponent who has obtained refuge should depart. This concordance of views suffices to explain the practice which has been noted in this connexion, but this practice does not and cannot mean that the State, to whom such a request for a safe conduct has been addressed, is legally bound to accede to it.'

Judge Alvarez dealt with a further aspect of the matter when he said that:[3]

> 'The territorial State may request the departure of the refugee from its territory and the State of refuge may then require the former State to deliver a safe conduct, enabling the refugee to leave the country safely.'

From these *dicta*, it would seem to be possible to formulate the two following ancillary propositions:

(i) If the territorial State demands that the refugee be sent out of the country, it must accord him a safe conduct.

(ii) If the territorial State is prepared to accord a safe conduct, the receiving State cannot refuse to accede to the request for his departure. (This seems to follow inevitably from the fact that the departure of the refugee from the country necessarily satisfies the sole *legitimate* object of the grant of asylum, whether that be the immediate safety of the refugee's person, or his protection from arbitrary treatment at the hands of the local authorities or courts.)

(*g*) *Nature of the conception of* '*Urgency*' *where the right to grant asylum is limited to* '*urgent cases*'.[4] This matter has in effect been dealt with under (*c*) above, but a further word may be added, since this point (that is to say the Court's view that the case before it was not a true example of urgency) constituted the immediate reason why the Court held that the grant of asylum had not been justified. It should be understood that there is no *general* principle of international law limiting the right to grant diplomatic asylum to cases of urgency *as such*. Urgency is indeed more a natural motive for *requesting* asylum than a legal precondition of its *grant*; though, given the fact that it normally is present (whether due to an immediate threat of mob violence or to the imminence of arrest by the local authorities), the absence of all circumstances of urgency will no doubt raise the question whether the necessary humanitarian basis really exists in a sufficiently compelling form to justify the grant of asylum. Assuming, however, that, owing to regional custom or a conventional rule, there is a specific *requisite* of urgency, it seems clear from what has been noticed under (*c*) above that urgency is not confined to the conception of urgency in the *immediate* 'time' sense. The Court was, it is true, impressed by the fact that three months had elapsed between the events which had caused the individual concerned to become a refugee and the seeking of asylum by him in a foreign mission. But it was principally influenced by the consideration that the only *danger* in which he allegedly stood was that of subjection to the ordinary processes of justice:[1]

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[1] *I.C.J.*, 1950, 297.

[2] Loc. cit. 279.

[3] Loc. cit. 295.

[4] Such was the position in the *Asylum* case, since one of the relevant Conventions expressly imposed this limitation.

> 'From these facts, regarded as a whole, the nature of the danger now becomes clear, and *it is upon the urgent character of such a danger* that the Government of Colombia seeks to justify the asylum—the danger of political justice by reason of the [sc. alleged] subordination of the Peruvian judicial authorities to the instructions of the executive.
>
> 'It is therefore necessary to examine whether, *and, if so, to what extent*, a danger of this kind can serve as a basis for asylum.' (Italics added.)

It is clear therefore that the Court related the whole conception of urgency, not to the time factor alone, but to the character of the danger or threat, and, as has already been observed, while not confining the case to mob violence, refused to regard liability to the regular application of the local processes of law as sufficient, unless such processes were arbitrary and, as it were, in fact extra-legal. It was in their view[2] 'inconceivable' that the term 'urgent cases' could

> '. . . include the danger of regular prosecution to which citizens of any country lay themselves open by attacking the institutions of that country'.

It follows that the differences of view between the Court and the Judges who dissented on this—the fundamental issue in the case (Judges Alvarez, Badawi Pasha, Read, and Azevedo)—did not turn on any contention that urgency necessarily meant urgency in the immediate temporal sense (though that might be a contributory factor). It was a difference of opinion as to the circumstances in which there could be said to be a *threat or danger* of such a character as to justify shielding the refugee from it by the grant of asylum. Nor did this difference turn on any contention (which none of the dissenting

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[1] *I.C.J.*, 1950, 283.

[2] Loc. cit. 284.

Judges advanced) that asylum could be granted so as to protect persons from the ordinary processes of justice. It turned rather on the circumstances in which these processes could be deemed to be normal and those in which they must, so far as the case of the refugee was concerned, be regarded as inherently abnormal, or liable to abnormality, and so constitutive of a special threat or danger. Judge Azevedo, as has been seen, considered that such a danger arose automatically for all political offenders and was inherent in the conception of a political offence, because in no such case could justice operate normally. Judge Read came to a not dissimilar, though less embracing, conclusion on different grounds. He agreed that normally 'it would be inconceivable, in principle, that governments could have intended 'urgent cases' to include the protection of political offenders from the local justice[1], but he considered that in the case of the South-American continent, the conventional and customary law of that continent made it clear that no presumption against such an intention arose: indeed the express purpose was to create a special régime applicable to political offences in periods of revolution or disturbance. He concluded, therefore, that, in South America—whereas in normal times 'urgency' could only arise from such things as an immediate threat of mob violence—in abnormal times, urgency so far as political offenders went, was inherent in the circumstances:[2]

> '. . . I am compelled to reach the conclusion that the expression "urgent cases" must be construed as restricting the grant of diplomatic asylum, as regards political offenders, to cases in which the grant is made "in times of political disturbance" of a revolutionary character, and as preventing the grant of asylum during periods of tranquillity.'[3]

Then, having found on the facts that the asylum in the case before the Court had been granted to a political offender 'in times of political disturbance', Judge Read concluded:[4]

> 'It follows that this was an urgent case. . . .'

Judge Badawi Pasha based his conclusions on a similar view, drawing the same distinction between the notion of urgency in the case of ordinary crimes and in that of political offences occurring in periods of disturbance:[5]

> 'The truth is that the notion of urgency is not the same for the two categories of offenders and that the consequences of asylum also differ according to whether the refugee is a common criminal or a political offender. In the former case, as soon as urgency in its strict sense has ceased, or if it has never even existed, the territorial State may demand his surrender, *whereas in the latter case it is the nature of the situation (revolution or rebellion) which determines the urgency*. . . .' (Italics added.)

It is clear that, so far as the Court itself was concerned, the idea that urgency was a generic or inherent characteristic of all cases of asylum granted to political offenders during periods of political disturbance would have been inconsistent with its view that, since the grant of diplomatic asylum involved *eo ipso* a derogation from local sovereignty, it could not be 'recognized unless its legal basis is established *in each particular* case' (see (*a*) above). Where urgency is a prerequisite of the right to grant asylum, the view favoured by Judges Badawi Pasha and Read would render it unnecessary to examine the facts of each particular case, provided only that the offence was political and the times disturbed, and hence would fail to allow of the carrying out of what the Court evidently regarded as an essential process of evaluation and assessment.

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[1] *I.C.J.*, 1950, 320.

[2] *I.C.J.*, 1950, 326.

[3] It is clear from other parts of Judge Read's remarks, however, that this language was not intended to exclude cases of danger from mob violence where this in fact existed.

[4] Loc. cit. 331.

[5] Loc. cit. 307.

JUDICIAL PRACTICE AND THE SUPREMACY OF INTERNATIONAL LAW

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ARTICLE 14 of the draft Declaration on the Rights and Duties of States[1] adopted by the International Law Commission of the United Nations at its First Session in May 1949 provides as follows:

> 'Every State has the duty to conduct its relations with other States in accordance with international law, and with the principle that the sovereignty of each State is subject to the supremacy of international law.'

In the report on the draft by the International Law Commission to the General Assembly it is stated that 'Article 14 of the draft Declaration . . . is a global provision which dominates the whole draft and, in the view of the Commission . . . appropriately serves as a key to other provisions of the Declaration in proclaiming "the supremacy of international law"'.[2] As courts are organs of the state, that article has a distinct bearing on the question of the attitude of courts in the matter of the relationship between international law and municipal law inasmuch as it lays down that the creation and operation of municipal law is limited by international law. It is proposed to examine in this article how far the practice of courts conforms with that principle.

In the first place it is intended to discuss the attitude of international tribunals to the question of the relationship between international law and municipal law. That attitude demonstrates the limitations upon the validity of municipal law when in conflict with international law. In stressing the international responsibility of states for the consequent violation of their international obligations, it reveals the problem of the enforcement of international law in the municipal sphere in its true light. However, the present article is concerned mainly with the practice of municipal courts. It is proposed to discuss, in the first instance, the extent to which they enforce customary and conventional international law. Such discussion can suitably be conducted by reference to the distinction between the so-called 'dualist' and 'monist' views of international law. Secondly, there will be considered various limitations on the enforcement of international law in the municipal sphere—in particular, the fact that municipal courts are bound to apply rules of municipal law, whether statutory or judge-made, even if these conflict with international law. Finally, it will be shown how in many states steps are being taken, by means of rules of construction and of legislative enactments, to overcome these limitations, and thus to bring the practice of municipal courts into accord with the international obligations of states.

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[1] *Official Records of the General Assembly*, Fourth Session, Supplement No. 10.

[2] Ibid., p. 10.

I. *The relation of international law and municipal law in the international sphere*

It appears to be generally agreed that international law is binding upon states, that failure to observe international law in the municipal sphere involves the responsibility of the state, and that the latter cannot rely upon its constitution as an excuse. These facts alone are sufficient to establish the supremacy of international law over municipal law. This was stated succinctly by Sir Arnold McNair in a paper read before the Grotius Society on 29 April 1944:[1]

> 'We admit unreservedly the supremacy of international law. . . . We admit that, if by reason of any deficiency in our legal institutions our Courts fail to give effect to a rule of international law binding upon us, it is the duty of the executive part of our Government to make good that deficiency by making reparation to the injured State. We admit also that we cannot plead as an excuse for a breach of an international obligation any defect in our own legal system.'

Emphatic statements have come from international tribunals to the effect that municipal law cannot affect international obligations, and that the latter are thus, ultimately at least, of an overriding nature. The Permanent Court of International Justice developed a 'constant jurisprudence' on the subject.[2] It held frequently that municipal law in conflict with international law could not prevail.[3] Conversely, the Court stressed repeatedly that failure on the part of a state to enact legislation necessary to ensure the fulfilment of international obligations cannot relieve it of its international obligations.[4] At the same time it was reluctant expressly to proclaim the nullity of municipal law which it considered to be in conflict with international law. In its Opinion on the *Interpretation of the Memel Statute*[5] the Court said:

> 'The Court thinks it well to add that its function in the present case is limited to that of interpreting the Memel Statute in its treaty aspect. It has arrived at the conclusion that on the proper construction of the Statute the Governor ought not to have taken certain action which he did take. It does not thereby intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect in the sphere of municipal law. This is tantamount to

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[1] *Transactions of the Grotius Society*, 30 (1944), p. 12.

[2] See, on this, Jenks in this *Year Book*, 19 (1938), pp. 67 ff.

[3] See *Publications of the P.C.I.J.*, Series A/B, No. 44, at p. 24; ibid., Series B, No. 17, p. 32; ibid., Series A, No. 24, p. 12; ibid., Series A/B, No. 46, p. 167; ibid., Series A, No. 1, p. 30.

[4] Ibid., Series B, No. 10, p. 20; ibid., Series B, No. 15, p. 26.

[5] Ibid., Series A/B, No. 49, p. 336. And see Jenks, loc. cit., at pp. 82–3, for a critical discussion of that decision.

saying that the dissolution is not to be regarded as void in the sense that the old Chamber is still in existence.'

Such an attitude takes account of the imperfections of international organization. But reference should be made to the view that, in applying the principle that 'reparation must, as far as possible, wipe out all the consequences of the illegal act, or re-establish the situation which would, in all probability, have existed if that act had not been committed',[1] the Court may, in some circumstances, come very near to annulling the illegal act.[2]

Similar trends may be seen in the attitude of other international tribunals. Parties before such courts cannot rely on their municipal legislation if it is in conflict with international law.[3] Nor can states excuse their failure to perform an international duty by reference to the insufficiency of their legislation.[4] Generally, arbitral tribunals have been emphatic that international law constitutes a limitation on the activity of the state in the municipal sphere.[5] Of particular significance, moreover, is the decision of the arbitrators in the dispute between Italy and Venezuela in the *Martini* case.[6] After finding that an order for the payment of certain sums made by the Venezuelan Federal Court constituted a denial of justice they said:

> 'Although the payment has never been made . . . the obligations exist in law. These obligations must be annulled under the heading of reparation. In pronouncing their annulment, the Arbitral Tribunal emphasizes that an illegal act has been committed and applies the principle that the consequences of the illegal act must be effaced.'

Throwing aside the caution displayed by the Permanent Court of International Justice, the arbitrators thus took the principle applied by that Court in connexion with the assessment of reparation to its logical conclusion. Of considerable interest also is the decision of the Franco-Mexican Mixed Claims Commission in the *Georges Pinson* case.[7] After stating that
? 'il est incontestable et incontestée que le droit international est supérieure au droit interne', the Court held that

> 'the very fact of the existence of a previous treaty or of rules of customary law constitutes an absolute impediment to the State to enact valid constitutional provisions in conflict with the rules of international law; the mere existence of the latter implies a corresponding restriction on the sovereignty of the State'.

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[1] *Publications of the P.C.I.J.*, Series A, No. 17, p. 47.

[2] See Guggenheim in *Hague Recueil*, 74 (1949), p. 238. And see the *Martini* case, *infra*, n. 6.

[3] See, e.g., the *Norwegian Claims* case (Scott, *The Hague Court Reports*, Second Series, 1932, at p. 64). See also *Annual Digest*, 1923–4, Case No. 96; ibid., 1929–30, Cases No. 110 and 171; *Revue générale de droit international public*, 39 (1932), p. 252.

[4] See, in particular, the *Alabama Arbitration* (Moore, *International Arbitrations*, vol. iv (1898), pp. 4101–9).

[5] See, e.g., the *North Atlantic Coast Fisheries* case (Scott, *The Hague Court Reports* (1916), at p. 169).

[6] *Annual Digest*, 1929–30, Case No. 93.

[7] *Revue générale de droit international public*, 39 (1932), particularly at pp. 432–3.

It is clear from the context that, in speaking of the 'validity' of municipal law in conflict with international law, the Court referred to formal validity, not to effectiveness in the municipal sphere. It did, indeed, admit expressly that national courts may be bound to enforce municipal law even if they are aware that it violates international law. The judgment did not therefore constitute a departure from the views, cited above, of the Permanent Court of International Justice. But the case provided, more clearly than most disputes in which international courts have refused to allow municipal law conflicting with international law to prevail before them, an instance of the direct relevance, in the international sphere, of the validity of a provision of municipal law. The legislation at issue did not relate to the substance of the international claim. The defendant state had invoked its legislation in order to prove that the individual on whose behalf the claim was brought was its national, and therefore unable to invoke the diplomatic protection of another state. It was contended, for the plaintiff, that the legislation in question was contrary to international law. The Court did not find it necessary to decide the point, but it expressed the view, in the phraseology quoted above, that if Mexico's legislation on nationality were contrary to international law, its effects could not be recognized by an international tribunal. It thus brought into relief the fact that the effectiveness of municipal law which is in conflict with international law is limited.

There is also an abundance of material to show that states, in diplomatic exchanges and international conferences, have given expression to similar views.[1] Of particular significance in this connexion are documents recording the admission, by delinquent states, of the supremacy of international law in relation to their municipal law. A striking admission of this nature was made before the Council of the League of Nations in the *Bernheim* case.[2] This was a petition to the Council complaining of the application, by Germany, of its anti-Jewish legislation in Upper Silesia in contravention of the Geneva Convention. Germany objected to the petition on the technical ground that the petitioner had no *locus standi*. However, with regard to the substance of the charge her representative made a declaration to the effect that

> 'It is obvious that international conventions concluded by Germany cannot be affected by internal German legislation. Should the provisions of the Geneva Convention have been violated in German Upper Silesia, this can only be due to mistakes on the part of subordinate organs acting under a mistaken interpretation of the law.'

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[1] See, e.g., *Parliamentary Papers*, 1863, vol. lxxii, p. 137 (Cmd. 3119), p. 281; ibid., 1876, vol. lxxxii, p. 1 (Cmd. 1482), Enclosure in No. 169, pp. 80–85; ibid., 1875, vol. lxxxii, p. 57 (Cmd. 1214), Enclosure in No. 1; ibid., 1870, vol. lxix, p. 439 (Cmd. 22), Enclosure in No. 3, pp. 5–6; ibid., 1871, vol. lxxi, p. 1 (Cmd. 244), No. 187, p. 134; ibid., 1867, vol. lxxiv, p. 121 (Cmd. 3771), No. 175, p. 154.

[2] See *Official Journal of the League of Nations*, July 1933, p. 833, and pp. 838 ff. See also Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942), pp. 261–6.

In his final report on the case the rapporteur, M. Lester, drew attention to that declaration, and proposed that the Council should take express note of it:

> 'It should be remembered that, in the statement made by the German representative to the Council on May 26, 1933, it is most plainly and categorically affirmed that internal legislation can in no case affect the fulfilment of international obligations. . . . This statement implies . . . that the German Government will take steps to ensure that the general laws and administrative orders shall not be applied in Upper Silesia so far as they are incompatible with the provisions of the Geneva Convention.'[1]

The movement for the codification of international law, under the auspices both of the League of Nations and of the United Nations, has shown remarkable unanimity amongst states on this subject. Point 1 of the Bases of Discussion regarding Responsibility of States for Damage caused on their territory to the person or property of foreigners, drawn up by the Preparatory Committee for the Codification Conference of 1930, provided, in part, that '. . . a State cannot escape its responsibility under international law, if such responsibility exists, by appealing to the provisions of its municipal law'.[2] Despite confusing language in some of the replies, it would appear that the twenty-three states who answered the request for information fully accepted that principle.[3] At the Codification Conference itself the principle was unquestioned.[4] Basis of Discussion No. 2 on the subject of Responsibility of States provided that:

> 'A State is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or of failure to enact the legislation necessary for carrying out those obligations.'[5]

That principle also received full support, both in the replies of governments[6] and at the Codification Conference,[7] although it failed to gain acceptance at the Conference owing to disagreement regarding the definition of 'international obligations'.

Article 13 of the draft Declaration on the Rights and Duties of States, drawn up by the International Law Commission in May 1947, provides as follows:

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[1] The Council took no action pending a decision on the legal question of the competence of the petitioner to approach the Council.

See also *Parliamentary Papers*, 1876, vol. lxxxii, p. 301 (Cmd. 1550), No. 22, p. 18, for a promise, by the Secretary of State of the United States, that he would attempt to obtain a repeal of an enactment in conflict with a treaty with Great Britain.

[2] *Bases of Discussion*, vol. iii, p. 16.

[3] Roumania is one of the apparent exceptions. In her reply she stated: 'We cannot admit absolutely the principle . . . which pre-supposes the existence of an international law on a higher plane than the constitution and internal law of the various States.'

[4] *Acts of the Codification Conference*, vol. iv, pp. 120–9.

[5] *Bases of Discussion*, vol. iii, p. 30.

[6] Twenty-three Governments replied, of whom twenty-two supported the principle (ibid., pp. 25–30).

[7] *Acts of the Codification Conference*, vol. iv, pp. 31–49.

> 'Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke limitations contained in its constitution or its laws as an excuse for failure to perform this duty.'[1]

Such opposition as there was to this article in the Commission and in the Sixth Committee of the General Assembly again was connected with the phrase 'other sources of international law'.[2]

The cases discussed above have been concerned with the responsibility of states for the acts or omission of state organs in the municipal sphere. More recently the problem of the relation of international law and municipal law has become of importance in connexion with the responsibility of individuals for violations of international law. It was repeatedly contended on behalf of persons accused of war crimes that they were bound to obey their national law, and that international law could not place the individual in an insoluble dilemma. Some of the courts which tried war criminals admitted that the fact that 'the accused had believed that the national law was always binding and . . . acted under a misapprehension of law which, in the circumstances then prevailing, must be regarded as excusable'[3] was a mitigating circumstance.[4] This was also the attitude adopted by some national legislatures in enacting laws relating to war crimes.[5] But there has been no disposition to admit that the defendants could rely on their municipal law to avoid responsibility at international law. This was stated most emphatically by the American Military Tribunal in the *Altstötter* case:[6]

> 'The argument that compliance with German law is a defence to the charge rests upon a misconception of the basic theory which supports our entire proceedings. The Nuremberg Tribunals are not German courts. They are not enforcing German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the Charter and Control Council Law No. 10, and within the limitations on the power conferred, it enforces international law as superior

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[1] *Official Records of the General Assembly*, Fourth Session, Supplement No. 10, pp. 8–9.

[2] See, e.g., A/C.6 SR. 170, pp. 14–15.

See also Principle 1 of the draft 'International law of the Future' compiled by the 'Hudson Committee' in 1944: 'Each State has a legal duty to carry out in full good faith its obligations under international law, and it may not invoke limitations contained in its own constitution or laws as an excuse for a failure to perform this duty.'

[3] *Trial of Hans Paul Helmuth Latza* by the Eidsivating Lagmannsrett of Norway, 18 February 1947–20 January 1948 (*Law Reports of the Trials of War Criminals*, selected and prepared by the United Nations War Crimes Commission, vol. xiv, p. 69).

[4] See also *Trial of General Shigeru Sawada* by a United States Military Commission in Shanghai, 1946 (ibid., vol. v, pp. 22–4).

[5] Belgian Law of 20 June 1947, Art. 3; French Ordinance of 28 August 1944, Art. 3; Luxembourg War Crimes Law of 11 August 1947, Art. 4.

[6] *Law Reports of the Trials of War Criminals*, vol. vi, pp. 48–9. See also the summing up of the Judge Advocate in the *Belsen Trial* (ibid., vol. ii, p. 149).

> in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e. the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. . . . Only when official organs of sovereignty participated in atrocities and persecution did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge.'

The principle underlying the judgments in this and similar cases was, moreover, clearly stated by the International Military Tribunal for the Trial of German Major War Criminals:

> '. . . the very essence of the Charter [of the Tribunal] is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.'[1]

It was reformulated by the International Law Commission, at its session of June 1950, as follows:

> 'Principle I: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
>
> 'Principle II: The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.'[2]

These developments may be contrasted with the emphatic statement, in the contrary direction, in the classical work of one of the leading 'dualist' writers at the end of the nineteenth century. Writing in 1899 Heinrich Triepel said:

> 'The duty of obedience owed by the *subject* to the law of the State is *absolute*, whatever the attitude of the latter in relation to international law may be. He has neither the duty nor the right to concern himself with the question whether municipal law is in conformity with international law.'[3]

There is room for a far-reaching theory of the supremacy of international law which recognizes that ultimate responsibility for a violation of international law falls upon individuals, and that the supremacy of national law can, accordingly, no longer be validly maintained.

II. *The relation of international law and municipal law in the municipal sphere*

1. *The application of 'dualist' principles.*

The essence of the dualist view is that international law cannot itself be applicable to the conduct of individuals within the state. Thus it has been held that individuals are not directly affected by treaties. In *Beier* v. *Minister*

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[1] Cmd. 6964 (1946), p. 42.

[2] *Official Records of the General Assembly*, Fifth Session, Supplement No. 12. The comment, in the Report of the International Law Commission to the General Assembly, on Principle II states that that principle 'implies what is commonly called the "supremacy" of international law over national law'.

[3] *Völkerrecht und Landesrecht* (French translation of 1920), p. 259.

of the Interior,[1] decided by the Supreme Court of South Africa (Appellate Division) on 28 May 1948, the Court considered that Article 278 of the Treaty of Versailles did not become directly operative in German municipal law so as to deprive the plaintiff of German nationality. In *Sipes* v. *McGhee*[2] the Supreme Court of Michigan held, on 7 January 1947, by reference to the contention that the human rights provisions of the Charter of the United Nations were applicable to the case:

> 'We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of these rights is sought in State courts.'

In a series of cases decided by courts of different countries it has been held that individuals are not directly entitled to compensation under treaty provisions for the payment of reparations.[3] Similarly, it has been held that individuals are unaffected by rules of customary international law. This has been of particular importance with regard to the rule of the respect of private property in state succession. Thus in *Cook* v. *Sprigg*[4] the Judicial Committee of the Privy Council said:

> 'It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer.
>
> 'It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such property within the ceded territory. All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.'

Moreover, it has been held repeatedly that individuals cannot recover, in municipal courts, damages awarded by an international tribunal, or paid by another state, in an international claim arising from injury to them.[1] In other words, individuals cannot, in any form, derive rights directly from international law. Finally, in one case it was denied that individuals are directly bound by a treaty so as to be obliged to carry out its provisions in good faith. In the *High Treason (Treaty of Versailles) in Germany* case[2] the German Reichsgericht held, by reference to the contention of the accused, that the information he had given to a foreign Power related to plans which, if true, would have constituted a violation of the Treaty of Versailles, that individuals are not only not bound to ensure the adequate performance of a treaty to which their country is a party, but that, as their primary duty is to promote the interests of their own state, they must do nothing to counteract the violation of a treaty by their government.

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[1] [1948] 3 South African Law Reports 409, at pp. 446–8.

[2] 25 N.W. (2d) 638. This statement is the more surprising as in the United States treaties are part of the law of the land. The decision was reversed by the Supreme Court, but on different grounds. See also *Kemp* v. *Rubin* (69 N.Y.S. (2d) 680), decided by the Supreme Court of Queen's County on 11 February 1947. The case of *George E. Warren Corporation* v. *U.S.* (*Annual Digest*, 1938–40, Case No. 1) is not in point here. In that case the plaintiffs not only claimed a right to exemption from customs duty on the basis of a treaty—a right already conceded in administrative proceedings—but claimed damages for illegal assessment. Damages are not normally given in the case of illegal assessment. The Court therefore held, correctly it would seem, that if, under a treaty, illegal assessment did give rise to a duty to pay damages, it was for the other contracting party to claim these damages.

[3] *Rustomjee* v. *The Queen* (1876), 2 Q.B.D. 69; *Baron de Bode's* case (1851), 3 H.L.C. 449; *Civilian War Claimants Association* v. *The King*, [1932] A.C. 14; *Knoop* v. *Administrator of Austrian Property*, [1933] Ch. 439; *N.* v. *Greek State, Annual Digest*, 1929–30, Case No. 230; *Liquidation of German Property* (*Treaty of Versailles*) case, *R.G.Z.* 121, 7; a Dutch case in *Annual Digest*, 1925–6, Case No. 117. It is possible to explain these cases by reference to the distinction, discussed below, between self-executing and non-self-executing treaties.

[4] [1899] A.C. 572, at p. 578. This and other cases relevant to the issue will be considered below with reference to the doctrine of act of state. The case has been quoted here because its statements are more far-reaching than would have been required to decide the issue. They are not in accord with the usual view of English courts. See also *In re Broussalian*, decided by an Italian court in Ethiopia in 1937 (*Annual Digest*, 1935–7, Case No. 47).

As, according to the 'dualistic' view, individuals cannot be directly affected by international law, each individual rule of international law must be 'transformed' into municipal law before it becomes applicable in the municipal sphere. It is important to define clearly the meaning of the doctrine of 'transformation', for it is often employed almost synonymously with the doctrine of 'adoption' which will be discussed below. The distinguishing feature of the doctrine of transformation is not that the municipal operation of international law is dependent on national law, and that the supremacy of the latter is thus, by implication, acknowledged. It will be shown below that that is to a large extent true also of the doctrine of adoption. The true meaning of the doctrine of transformation is that each rule of international law must be individually incorporated in municipal law, as international law itself is by its nature inapplicable in the municipal sphere. The doctrine is thus more obstructive of the effectiveness of international law than the principle of the general adoption of international law. Moreover, on its own assumptions, it denies the possibility of development towards the supremacy of international law in the municipal sphere.

It is also important to determine what acts can be regarded as constituting the process of 'transformation'. It is clear that a legislative act 'transforms' a rule of international law, whether customary or conventional.[3] It has also been suggested that official promulgation of a treaty, unlike publication, is an act of transformation.[1] For promulgation, although it is not the basis of the validity of the law promulgated, is considered to bring it into force.[2] It thus creates doubt as to the effectiveness of the international act of exchange of ratifications which, in international law, brings treaties into force. Publication, in contrast, is said merely to draw public attention to the existence of the treaty. In practice such a distinction is difficult to maintain. In many countries publication is an essential preliminary to the internal binding force of a treaty,[3] by reference to the doctrine that individuals must be informed of the law with which they are expected to comply. The effective operation of a treaty in the municipal sphere is thus, again, made dependent on a municipal act. However, the process of transformation means not only that a municipal act brings the treaty into force, but also that the internal validity of the treaty is based on that municipal act. The practice of states has, on the whole, shown an awareness that neither promulgation nor publication are the basis of the binding force of international treaties within the state.[4] There are, therefore, grounds for suggesting that neither process amounts to transformation. Finally, reference may be made to the doctrine of the 'transformation' of customary international law by its application in municipal courts. Lip-service has been paid to such a doctrine in some recent English decisions, in particular in the case of *Commercial and Estates Co. of Egypt* v. *The Board of Trade.*[1] It is difficult to see the meaning of such a doctrine. Transformation, it has been shown above, implies that international law itself is by its nature inapplicable in the municipal sphere. It is, then, a confusion of terms to suggest that international law is transformed while being enforced in a municipal court.[2, 3]

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[1] See *Heirs of Oswald* v. *Swiss Government* (1926), *Entscheidungen des Schweizerischen Bundesgerichts*, vol. 52, Part II, p. 235; and *E. & F. Assets Realisation Co.* v. *Hull* (*Annual Digest*, 1941–2, Case No. 134). This view has developed from the fact of the procedural incapacity of individuals in the international sphere, and the assumption that the state, in taking up a case, asserts a right of its own. See on this the Advisory Opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*, *I.C.J. Reports*, 1949, pp. 181–2.

[2] *Annual Digest*, 1927–8, Case No. 5. See also, for a similar case, *Juristische Wochenschrift*, 1924, p. 1531.

[3] See on this Scelle, *Précis de droit des Gens*, vol. ii (1934), pp. 351–2.

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[1] Noël, *De l'autorité des traités comparée à celle des lois* (1922), p. 138. See also *Annual Digest*, 1923–4, Case No. 187.

[2] For a particularly striking decision, illustrating this point, see a judgment of the Italian Court of Cassation of 25 May 1927 (ibid., 1927–8, Case No. 275). The Court held that a treaty acquired force in municipal law by virtue of promulgation even though ratification had not yet taken place. See also *U.S.* v. *Arredondo* (6 Pet. 691); *Haver* v. *Yaker* (9 Wall. 32); *Davis* v. *Concordia* (9 How. 288); *Hylton* v. *Brown* (1 Wash. C.C. 343). In France, particularly, promulgation has always been considered to bring treaties into effect. See the cases cited in Masters, *International Law in National Courts* (1932), pp. 133–4.

[3] See *Pandectes Belges*: 'Convention Internationale', No. 137, on treaties which do not require legislation, and *Pasicrisie Belge*, 1883, vol. iii, p. 67. On the position in Switzerland see Masters, op. cit., pp. 95–96. Guggenheim (*Lehrbuch des Völkerrechts*, vol. i (1947)), while maintaining that organs of the state are bound to apply treaties even without publication, admits that only upon publication do treaties become binding upon individuals. In Germany treaties have to be published in order to be binding. See the decisions of the Reichsgericht of 22 June 1922 (*R.G.Z.* 105, p. 156, at p. 159); 23 May 1925 (*R.G.Z.* 111, p. 40); 25 February 1929 (*R.G.Z.* 124, p. 120). And see, for some Polish decisions on this point, *Annual Digest*, 1929–30, Cases No. 223 and 224.

[4] See Rolin in *Transactions of the Grotius Society*, 30 (1944), p. 33, on the Belgian attitude to the Treaty of Versailles; Guggenheim, op. cit., who considers that publication is declaratory, not constitutive, of the beginning of the effectiveness of treaty obligations; Hoijer, *Les Traités internationaux* (1928), vol. ii, p. 328. See also some decisions, in a contrary sense to the decision quoted above, of the Italian Court of Cassation, to the effect that treaties come into force in Italy only after ratification even though they have previously been promulgated within Italy (*Annual Digest*, 1925–6, Case No. 256; *Procedura Penale Italiana*, 1927, p. 3181). This can only be true, however, of treaties whose promulgation and publication are not preceded by a legislative act, i.e. a proper act of transformation—unless that legislative act contains a stipulation making its coming into force conditional upon the exchange of ratifications. German courts have repeatedly held that treaties by publication become municipal law, apparently by reference to the view that prior approval of the treaty by legislative organs (see below, p. 57) constituted its transformation. See *R.G.Z.* 117, p. 280, at p. 284; *R.G.Z.* 107, p. 44, at p. 47; *Fontes Juris Gentium*, ed. by Bruns, Series A, Section 2, vol. i, Part 1.

Transformation is thus effected by a legislative act which is the basis of the municipal validity of each individual rule of international law. The practice of states shows that customary law is not now so transformed. There are, no doubt, statutes in most countries which give effect to rules of customary international law. A well-known example is the Act of 7 Anne which, while expressly stressing that it was declaratory of international law, gave statutory sanction in England to the law of diplomatic immunities. But it would appear that, save for the apparent exception of *Reg.* v. *Keyn*,[4] in no case has a court refused to give effect to a rule of customary international law because it had not been expressly incorporated into national law.[5,6]

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[1] [1925] 1 K.B. 271—*per* Atkin, L.J.: 'International Law as such can confer no rights cognisable in the municipal courts. It is only in so far as the rules of International Law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.' See also *Chung Chi Cheung* v. *The King*, [1931] A.C. 60, at pp. 167–8; and *The Cristina*, [1938] A.C. 485, at p. 502. For a discussion of these cases see Lauterpacht in *Transactions of the Grotius Society*, 25 (1939), pp. 77–84. And see *In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa . . . to Levy Rates on Foreign Legations*, decided by the Supreme Court of Canada on 2 April 1943 (*Annual Digest*, 1941–2, Case No. 106), and *Reference re the Exemption of United States Forces from Canadian Criminal Law*, decided by the same Court on 3 August 1942 (ibid., 1943–5, Case No. 36).

[2] To contend that a rule, to be enforceable, must at some previous time have received the judicial imprimatur, is merely to refer the controversy one stage back. Such a contention is, moreover, indefensible, first, because it is not supported by fact—the *Commercial and Estates Co.* case, for instance, was a case *primae impressionis.* Secondly, it can have application only in countries where the doctrine of binding judicial precedent obtains, for otherwise the previously expressed opinion of another court is of no direct legal relevance. Continental courts, indeed, have firmly repudiated the suggestion that customary international law, in order to be binding on municipal courts, must have become part of national customary law (see, for instance, the case of *Von Hellfeld* v. *Russian Government*, reported in *American Journal of International Law*, 5 (1911), pp. 490 ff.). It is hoped to show below the undesirability of the application, to the enforcement of international law, of the doctrine of binding judicial precedent.

[3] For a discussion of the terminological controversy as to whether international law, when applied in municipal courts, must be described as municipal law, see Lauterpacht, loc. cit., p. 85. He points out that municipal law may be defined as the law enacted by the state and its organs, and that there is no terminological looseness in the assertion that courts apply international, or even foreign, law, as such.

[4] See below, p. 67.

[5] See, for a recent instance of a court applying a rule of customary international law despite the contention of the appellant that the rule was not known to national law, *Ministre de la Marine* v. *C^ie Franco-Tunisienne d'armements*, decided by the Court of Appeal of Aix on 10 July 1946 (*Dalloz*, 1948, p. 155). In the International Law Commission there was some uncertainty as to whether international law requires transformation. See A/CN.4/SR. 14, pp. 5–6; and see *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States*, Memorandum submitted by the Secretary-General, for the comments of Greece and India on the proposed Art. 14. That article was later deleted. The cases mentioned above in which rules of international law concerning state succession were not applied, were governed by the doctrine of act of state, and did not turn on the applicability of international law in general.

[6] It has been contended (see, e.g., Masters, op. cit., p. 48) that the courts of some countries

Some types of treaties, on the other hand, are, in many countries, required to be 'transformed' before they will be enforced. This is so, for instance, in Great Britain.[1] English courts have, on occasion, refused to apply treaties on the ground that they have not been made part of municipal law. In the case of *Walker* v. *Baird* the Judicial Committee of the Privy Council, although not required to decide the issue directly, indicated that it was doubtful whether treaties which had not received legislative approval could be enforced.[2] In *Republic of Italy* v. *Hambros Bank*,[3] the Court refused to apply a financial agreement between the Republic of Italy and the British Government on the ground that it had not been legislated upon. It held, moreover, that a treaty could not be incorporated into domestic law by allusion when there would have been no difficulty in doing so expressly and when an obvious opportunity for doing so presented itself. Similarly, the Supreme Court of Canada held, in 1932, in the case of *Re Arrow River and Tributaries Slide and Boom Co.*, that the Ashburton Treaty of 1842 was not enforceable by the courts as no legislation had ever implemented or sanctioned the treaty.[4] The Italian Court of Cassation, in the same year, refused to apply the Brussels Convention on Salvage as it had not, at the time the dispute arose, been incorporated into Italian law by legislation.[5] In a decision of 12 June 1926, the Supreme Administrative Court of Czechoslovakia refused to apply the Peace Treaties of 1919 on the ground that they had not been incorporated into municipal law.[6] In Belgium the Court of Appeal of Brussels held, on 1 May 1940, that treaties which may affect Belgian nationals individually are only operative if the assent of both Chambers has been obtained.[7]

regard international law, when applied in their courts, as national law because they permit appeals in revision on issues of international law, but not on points of foreign law. The distinction between international and foreign law in this connexion would appear to be that the courts are bound by international law, but not by foreign law. In that sense international law is part of national law, that is, of the law binding on the national community. But that does not mean that its method of creation and the immediate source of its validity may not differ from that of municipal law *stricto sensu*. The question of 'revisible norms' throws no light on the question why international law is binding on national courts. See, on this question, Lewald in *Hague Recueil*, 57 (1936).

[1] See Lauterpacht in *Transactions of the Grotius Society*, 25 (1939), pp. 73–76; McNair, in this *Year Book*, 9 (1928), pp. 56 ff.

[2] [1892] A.C. 491. See also Sir Robert Phillimore's decision in *The Parlement Belge* (1879), 4 P.D. 129. The judgment was reversed on appeal, but by reference to a different issue: (1880), 5 P.D. 197.

[3] [1950] 1 A.E.R. 430. See also *Knoop* v. *Administrator of Austrian Property*, [1933] Ch. 439.

[4] [1932] 2 D.L.R. 250; *Annual Digest*, 1931–2, Case No. 2. Both the lower courts agreed with the general principle enunciated by the Supreme Court, but the Court of Appeal considered that the Ontario Statute, by reference to which the dispute arose, could be construed in accordance with the treaty (66 Ontario L.R. 577; [1931] 2 D.L.R. 216). See also *Bitter* v. *Secretary of State for Canada*, [1945] 3 D.L.R. 272, *Annual Digest*, 1943–5, Case No. 86. But see *dicta* in *Secretary of State for Canada* v. *Alien Property Custodian for the United States*, [1931] 1 D.L.R. 890; and in *Ritcher* v. *The King*, [1943] 3 D.L.R. 540.

[5] *Annual Digest*, 1931–2, Case No. 3.

[6] Ibid., 1925–6, Case No. 5, with a list of earlier decisions. See also ibid., 1927–8, p. 18; 1931–2, p. 13; 1933–4, p. 15.

[7] Ibid., 1919–42 (Supplementary Volume), Case No. 4. See also ibid., 1919–22, Case No. 302,

Certain legal consequences follow from this attitude. In the case of *Dominges Caitano Rodrigues* v. *Ministère Public*, decided by the Mixed Court of Appeal of Alexandria on 6 June 1938, the Court held that, as a treaty 'derives its force, from the internal point of view, from the legislative measures which incorporate it into internal law', a conflict between a treaty and the law which gives it internal force must be resolved in favour of the latter.[1] Similarly, the House of Lords, sitting as a Court of Appeal for Scotland, held, in 1933, in the case of *Barras* v. *Aberdeen Steam Trawling and Fishing Co., Ltd.*, that a phrase in an Act of Parliament giving effect to a treaty must be interpreted in the same way as the same phrase when used in earlier statutes, even if that interpretation is not the equivalent of the meaning of the Convention.[2] Again, on the assumption that a municipal act is the legal basis of a treaty within the state, courts occasionally give effect to a treaty after municipal promulgation although ratification has not yet taken place.[3] Conversely, the German Reichsgericht held, in a case decided in 1917, that, although a treaty between belligerents lapsed on the outbreak of war, private enemy nationals could still rely on the municipal legislation giving effect to the treaty, unless and until the legislature expressly revoked it.[4]

Many countries, then, act upon what may be called the dualistic doctrine of international law and municipal law in the matter of the application and enforcement of treaties. They do so, however, for practical reasons, not by reference to considerations of principle. This means that there is nothing

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and *Belgique Judiciaire*, 1883, p. 811. And see, for some German decisions to the same effect, *Annual Digest*, 1925–6, Case No. 7; *R.G.Str.* 45, p. 30. The question whether the attitude of Belgian and German courts represented the correct view of the law of the countries concerned will be discussed below. On Polish practice in the matter see Kuratowski in *Transactions of the Grotius Society*, 30 (1944), pp. 40–42.

[1] *Annual Digest*, 1938–40, Case No. 186. The Court found that, as the law, unlike the treaty, contained no provisions regarding signatories who fail to ratify, the provisions of the treaty must be applied also to nationals of states who failed to ratify. See also *N.* v. *Greek State*, *Annual Digest*, 1929–30, Case No. 230; *R.G.Str.* 62, p. 373; *Schieble* v. *Procurator-General of Brussels*, *Annual Digest*, 1925–6, Case No. 6; and *Sheriff es Shanti* v. *Att.-Gen. for Palestine*, *Annual Digest*, 1935–7, Case No. 31.

[2] [1932] A.C. 402. The Court stressed that the statutory interpretation was more favourable to the persons the Convention intended to protect. The difficulty arose from the fact that the Merchant Shipping (International Conventions) Act did not reproduce the Geneva Convention literally, but translated it into the technical language of the Merchant Shipping Acts. See also *Ellerman Lines, Ltd.* v. *Murray*, [1931] A.C. 126. On the interpretation of treaties in general, see *Pandectes Belges*: Convention internationale, Nos. 163 and 168, to the effect that treaties must be interpreted like ordinary laws—i.e. by reference to national rules of interpretation.

[3] See, e.g., *Annual Digest*, 1927–8, Case No. 275.

[4] *R.G.Z.* 85, p. 375, at p. 376. The value of the decision is somewhat lessened by the fact that the Court seemed doubtful whether the treaty had lapsed. See also *R.G.Z.* 111, p. 40, at pp. 44–45, where the requirement of specific repeal was stated not to apply in the case in question but where it seems to have been regarded as a general rule. For a similar Polish decision see *Annual Digest*, 1931–2, Case No. 197. Contrast a decision of the Italian Court of Cassation, *Giurisprudenza Italiana*, 81 (1929), I, at p. 341.

inevitable about the practice; when there are means of overcoming the practical difficulties these states may act upon principles more consistent with the development of the supremacy of international law. The main factor determining the practice of states in this connexion is the lack of specialization of governmental functions in the international, as opposed to the municipal, sphere. Traditionally heads of states and governments fulfil both legislative and executive functions in the international sphere. States with a democratic constitution have therefore been reluctant to give treaties concluded by such unrepresentative organs the force of law within the state without express acceptance by their own representative legislative organs. Thus in England treaties require legislation because, as they are concluded by the Crown alone, they might be the means for the Crown to impose burdens upon the subject and to legislate for him without the concurrence of Parliament.[1]

This analysis is confirmed by a study of the treaty-making power of those states—such as the United States and France—which do not require the transformation of treaties for their municipal effectiveness. In the United States, where, it will be shown below, treaties are the supreme law of the land, the consent of the Senate, representative of the states of the Union, is necessary for the ratification, and therefore for the international validity, of a treaty.[2] There is, thus, a representative legislative organ already in operation in the international sphere. Even so, there is some authority that treaty provisions regarding matters, such as the disbursing of public funds, which are pre-eminently within the sphere of competence of the lower house of Congress, the House of Representatives, require legislative action for their municipal effectiveness.[3] Similarly, in France, where treaties do not require legislation in order to be effective in the municipal sphere, Article 27 of the Constitution of 27 October 1946 requires the authorization of the legislature for the international validity of the following categories of treaties:

> 'les traités relatifs à l'organisation internationale, les traités de paix, de commerce, les traités qui engagent les finances de l'État, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, ceux qui modifient les lois

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[1] See Lauterpacht, loc. cit., pp. 74–75. It is noteworthy that treaties affecting the rights of the Crown only are usually considered not to require legislative approval for their municipal effectiveness. See ibid., and McNair in this *Year Book*, 9 (1928), pp. 63 ff..

[2] It is a controversial question whether a treaty ratified by the head of a state without the assent, required by the constitutional law of the state, of a representative organ can give rights to the other contracting party. See, e.g., Fitzmaurice in this *Year Book*, 15 (1934), and *Harvard Research on Treaties* (1935), pp. 992–1009.

[3] See *Frelinghuysen* v. *Key* (110 U.S. 64); *La Abra Silver Mining Co.* v. *U.S.* (175 U.S. 423); *Turner* v. *American Baptist Union* (1852), 5 McL. 344, 347; Anderson in *American Journal of International Law*, 1 (1907), pp. 648–52. See also, on the creation of new crimes, *The Bello Corrunnes* (6 Wheat. 152). These treaties are often described as 'non-self-executing' (see below, pp. 66–68).

internes françaises, ainsi que ceux qui comportent cession, échange, adjonction de territoire . . . .'[1]

In Switzerland treaties do not require special legislation for their internal validity. There, too, ratification by the Bundesrat is preceded by authorization of the Bundesversammlung, the main legislative organ.[2] In Argentina, also, treaties are apparently ratified only after authorization of the legislature, and then become automatically binding in municipal law.[3]

The point is also illustrated by the treatment, in countries where treaties are not normally transformed, of informal conventions and governmental agreements which do not pass through the ordinary formalities relating to the conclusion of treaties. In the case of *Four Packages of Cut Diamonds* v. *United States*, a United States Circuit Court of Appeals held that a governmental agreement was not effective in the municipal sphere: 'Such Conventions are not treaties because not made with the advice and consent of the Senate. . . .'[4] In *In re McCall's Estate*[5] another United States Court held that protocols leading to an international award did not have the force of municipal law 'unless ratified like treaties'. Similarly, in *In re Talbot*[6] the

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[1] See, for a description of the constitutional conflicts between executive and legislature arising out of early nineteenth-century constitutions in which the executive alone concluded treaties, Masters, op. cit., pp. 131–2. And see, for a case involving a treaty of that period, *Lanco* v. *Singer Co.*, *Annual Digest*, 1929–30, Case No. 153, where it was held that a legislative provision could not be abrogated by such a treaty.

Under the Constitution of 1875 the authorization of the legislature was required for the ratification of treaties liable to burden the state and such treaties were automatically effective. However, other treaties involving a modification of French law did not require authorization of the legislature for their international validity. Such treaties were, in practice, submitted to the legislature for approval to ensure their internal effectiveness. It was suggested, *obiter*, by a court of first instance, in the case of *Six et Cie 'La Zurich'* v. *Opsomer* (1926), *Clunet*, 54 (1927), p. 119, that a treaty ratified by the President on his sole authority and promulgated by decree could not modify French law. See also, for similar decisions, *Clunet*, 1 (1874), p. 107; 53 (1928), p. 1223. But see a decision of the Court of Cassation to the contrary effect (*Sirey*, 1888, Part i, p. 17). The authorities are conflicting, but it may be possible to say that under the constitution of 1875 French practice was still partially dualist in that it required legislative approval for the municipal effectiveness of treaties involving a modification of French law which had achieved international validity without that assent.

[2] See Masters, op. cit., pp. 93–94, and Art. 85 of the Constitution of 1874.

[3] See *Montero* v. *Fernandez*, *Annual Digest*, 1938–40, Case No. 188.

See also Art. 64, para. 1, No. 1, of the Czech Constitution of 1920. An exception which tends to prove the rule is provided by the law of Nazi Germany. In 1933 the Government was given power to legislate without the participation of the legislative organs. At the same time Art. 4 of the Law of 24 March 1933, for Removing Distress from the People and the Reich (*Reichsgesetzblatt*, 1933, vol. 1, p. 111), provided that 'treaties, in so far as they refer to subjects falling within the purview of the legislation of the Reich, do not require legislation of the organs in question; the Government of the Reich issues regulations to give effect to them'. It was suggested (see *Deutsche Juristen Zeitung*, 1933, p. 459) that the treaty thus required legislation—but by a new legislative organ—for its internal effect. In fact it would appear that, as the organ required to legislate was the same as that which concluded the treaty, treaties were, upon publication, considered to be part of the law of the land. See, e.g., *Annual Digest*, 1933–4, Case No. 176.

[4] 256 Fed. 305; *Annual Digest*, 1919–22, Case No. 226.

[5] 28 Pa. Dist. Ct. 422; *Annual Digest*, 1919–22, Case No. 126.

[6] *Gazette du Palais*, 1947, vol. ii, p. 17. See also *In re Colman*, decided by the same Court on 5 December 1947 (*Revue critique de droit international privé*, 36 (1947), pp. 435–8).

Court of Appeal of Paris held that an exchange of notes between the French and Belgian chancelleries for the extension of the extradition treaty between the two countries could not, 'without ratification and publication, have force of law. . . .' The same view was expressed in *Re Vermote*.[1]

Some courts and writers have regarded parliamentary authorization of the treaty as 'transformation' thereof, thus confusing two distinct acts, one of which has international relevance, while the other is only nationally important. This has been so, on occasion, in Holland[2] and in Switzerland.[3] German courts, in particular, which have been the foremost exponents of the doctrine of transformation and of the dualism of international law and municipal law, have considered that representative legislative organs, in authorizing ratification of a treaty, transform the latter into municipal law.[4] This attitude is mainly due to the fact that the method of dealing with a treaty fulfils the conditions laid down by the constitution for the passage of statutes.[5] But it is submitted that the doctrine of transformation loses its real meaning—namely, that international law and municipal law are, in essence, different—if we consider that an act of participation in the international creation of a treaty at the same time 'transforms' the treaty into a separate municipal law. Modern German constitutional law could be equally well described by saying that treaties which have been concluded in accordance with the constitutional requirements of German law are applied as part of the law of the land.[6] In that case it would be representative of the monist view of the relation of international law and municipal law.

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[1] *Sirey*, 1950, Part ii, p. 154.

[2] See Schurmann in *Transactions of the Grotius Society*, 30 (1944), p. 36.

[3] See *In re Lepeschkin, Annual Digest*, 1923–4, Case No. 189.

[4] *R.G.Str.* 57, p. 61; *Juristische Wochenschrift*, 1925, p. 1293; ibid., 1927, p. 2310. Examples from the period of the Empire must be used with caution. Art. 11 of the Imperial constitution of 1871 apparently required, in addition to the consent of the Bundesrat for the international validity of a treaty, the consent of the Reichstag for its municipal effectiveness only. See Masters, op. cit., pp. 27–32.

[5] The Weimar Constitution, Art. 45 (3), required the consent of the Reichstag only for the international validity of certain treaties. That consent was in practice given in the form of a statute—i.e. with the participation also of the Bundesrat (Anschütz, *Die Verfassung des Deutschen Reichs*, 3rd ed. 1930, pp. 236–7). In that it resembled Polish practice (see *Annual Digest*, 1927–8, Cases No. 7–9, with a note by Ehrlich). But in Poland, apparently, the statute contained directions to ministers to execute the treaty; that extra clause was regarded as tantamount to transformation. Art. 59 (*c*) of the *Grundgesetz für die Bundesrepublik Deutschland* (1949) provides as follows: 'Treaties which regulate the political relations of the Federation or are concerned with subjects within the scope of Federal legislation require the approval or participation of the competent legislative bodies in the form of a Federal statute.'

[6] This view is supported by decisions of German courts to the effect that approval of a treaty by the legislative organs cannot give it municipal force of law prior to ratification. See *Annual Digest*, 1931–2, Case No. 196; ibid., 1933–4, Case No. 183; *R.G.Z.* 124, p. 204. And see the phraseology of another decision (*Annual Digest*, 1933–4, Case No. 3): '. . . such treaties as are concluded by the President under Article 45 (1) of the Constitution and are agreed to by the Reichstag and promulgated as laws under Article 45 (3) have the force of law . . . directly as regards the internal organs of the state.'

2. *The application of 'monist' principles.*

The essence of the monist view of the relation of international law and municipal law is that all rules of law, international law and municipal law alike, are applicable to individuals, and that international law can thus be directly operative in the municipal sphere. Modern decisions have affirmed that individuals can derive rights directly from treaties. The High Court of Danzig, in the case of *Menge* v. *Polish Railway*, held that individuals can put forward claims grounded directly in a treaty.[1] That decision was affirmed by the Permanent Court of International Justice in its Advisory Opinion on the *Jurisdiction of the Courts of Danzig*. The Court held that

> 'It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts.'[2]

That judgment, in its turn, was applied by the High Court of Danzig in the *Zoppot Street-Crossing* case.[3] In the United States individuals now have a statutory right, enforceable by mandamus, to recover moneys due under treaties. There have been several decisions to the effect that they are entitled to sue for their share in a sum paid by one state to another under a treaty intended to settle outstanding claims, or as the result of an international award.[4] Other municipal courts, also, have used language affirming that individuals derive rights from treaties.[5] The language of Mixed Arbitral Tribunals has shown a similar trend.[6] Similarly, it has been held that individuals can rely on rules of customary international law before municipal tribunals and otherwise. The denial of such a right in the practice of countries where the dualist doctrine prevails was shown to be most significant in connexion with cases of state succession. The more salutary principle followed by reference to monist doctrine is, again, of particular importance in connexion with cases of that nature. Thus, in a recent case, *Playa de Flor Land and Improvement Co.* v. *United States*, a United States District Court in the Panama Canal Zone held, citing many authorities, that 'in case of acquisition of territory, United States courts, in passing upon the rights of the inhabitants, are governed by the stipulations of the treaty of cessation and the law of nations'.[1] More generally, it was held by the American–Mexican General Claims Commission in the *North American Dredging Co. of Texas* case,[2] that the rules of public international law are applicable to individuals. Courts have also recognized that individuals may be subject to duties under treaties or customary international law. The Amsterdam Court of Appeal held, in 1928, in the *Papadopoulos* case,[3] that individuals, as well as states, were bound by the provisions of the Treaty of Lausanne. The Supreme Court of Pennsylvania, in *Respublica* v. *Longchamps*,[4] an early case expressly declared to be *primae impressionis*, said, in sentencing the accused for an assault on the French Consul-General: 'The first crime in the indictment is an infraction of the law of nations. This law, in its full extent, is part of the law of this state. . . .' The war crimes trials have affirmed the principle that individuals may be directly subject to duties imposed by international law. In a wider sphere the Supreme Court of the United States has laid down that private relations in general can be affected by international law. In *Hurd* v. *Hodge*[5] it held that 'the power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, *treaties*,[6] federal statutes and applicable legal precedents'. As international law is thus not by its nature inapplicable to individuals, it can be 'adopted', as such, into the national law of individual states. This means that a specific act of 'transformation' of each individual rule of international law is not required before international law can be applied to legal relations within the state. 'Adoption' does not mean that international law is operative in the municipal sphere 'by virtue of a rule of international law superior to and independent of the will of the state'.[7] The enforcement of international law within the state under the doctrine of adoption is dependent on the will of the state concerned.[1] This means, once more, that the supremacy of national law in the municipal sphere is recognized and that it results in various extensive limitations on the application of international law.[2] But the doctrine of 'adoption' differs from the doctrine of 'transformation' in that it makes possible the automatic operation of international law in the municipal sphere, with a consequent enhancement of its authority. Moreover, unlike the doctrine of 'transformation', the doctrine of 'adoption' leaves room for further development towards the supremacy of international law in the municipal sphere.

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[1] *Annual Digest*, 1925–6, Case No. 258.

[2] *Publications of the P.C.I.J.*, Series B, No. 15, pp. 17–18.

[3] *Annual Digest*, 1933–4, Case No. 104.

[4] See, e.g., *American–Mexican Claims Bureau, Inc.* v. *Morgenthau*, *Annual Digest*, 1938–40, Case No. 106. See also *La Ninfa*, 75 Fed. Rep. 513.

[5] See, e.g., *Wirbelauer* v. *Lippmann Rosenthal en Co.*, decided by the District Court of Amsterdam in 1925 (*Annual Digest*, 1927–8, Case No. 36); and the *Noujaim* case, decided by the Egyptian Summary Tribunal of Port Said (ibid., 1931–2, Case No. 217*a*).

[6] See, e.g., the *Sigwald* case, decided by the Franco–German Mixed Arbitral Tribunal in 1926 (*Annual Digest*, 1925–6, Case No. 255); and *Lederer* v. *German State*, decided by the Anglo-German Mixed Arbitral Tribunal in 1923 (*Recueil des décisions des tribunaux arbitraux mixtes*, 3 (1927), p. 762).

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[1] 70 F. Supp. 281. See also *United States* v. *Fullard Leo*, decided by a Circuit Court of Appeals in 1946, 156 F. 2d 750. And see the Advisory Opinion of the Permanent Court of International Justice in the case of the *German Settlers in Poland* (Series B, No. 6).

[2] *Annual Digest*, 1925–6, Case No. 191.

[3] Ibid., 1927–8, Case No. 285.

[4] (1784) 1 Dallas Reports 111. The Court commented on the case of the Russian Ambassador to England, which was never brought to judgment and which led to the enactment of the Statute of 7 Anne on diplomatic immunities, as follows: 'The Court (of King's Bench) never doubted that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them; but no punishment less than death would have been thought by the Czar an adequate reparation. . . .'

[5] (1948), 68 Sup. Ct. 847, 334 U.S. 24. And see in particular *Re Drummond Wren*, *Annual Digest*, 1943–5, Case No. 50.

[6] Italics are the writer's.

[7] See Lauterpacht, loc. cit., p. 84. This is probably the meaning of the decisions of English courts, discussed above in connexion with the 'transformation' of customary international law, to the effect that in municipal courts 'international law has no validity save insofar as its principles are accepted and adopted by our own domestic law' (*Chung Chi Cheung* v. *The King*, [1939] A.C 160, at pp. 167, 168. See also *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271; *The Cristina*, [1938] A.C. 485).

The doctrine of 'adoption' is now very widely accepted with regard to customary international law. In origin the doctrine is Anglo-American; in both England and the United States it has a longer history of judicial application than in other countries, and in both it has long been a principle of the common law.[3] But in other countries, too, there are early instances of its application. In the case of *Dientz* v. *de la Jara*[4] a French court held, with regard to diplomatic immunity, that 'Consacrée par le droit des gens, cette immunité s'impose aux tribunaux comme une règle d'ordre politique supérieur qu'ils sont tenus de respecter. . . .' A Prussian court, in the case of *Ziemer* v. *Rumänien*, said:

> 'The rule of international law, recognised by all the other great civilised states, that the property of foreign states may not be attached, is operative on Prussian courts, although this rule is not expressed in any Prussian statute or in any treaty concluded by Prussia.'[5]

In the case of *K. K. Oesterreichisches Finanzministerium* v. *Dreyfus*[6] the Swiss

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[1] In many countries the adoption of international law is based on express constitutional provisions.

[2] These will be dealt with below.

[3] See on this Lauterpacht in *Transactions of the Grotius Society*, 25 (1939), pp. 51–88; Picciotto, *The Relation of International Law to the Law of England and of the United States* (1915). And see, for leading decisions on the subject, *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B. 391; *Duke of Brunswick* v. *King of Hanover* (1844), 6 Beav. 1; *Emperor of Austria* v. *Day* (1861), 2 Giff. 628; and, in the United States, *Hilton* v. *Guyot* (1895), 159 U.S. 113, 163; and *The Paquete Habana and The Lola* (1899), 175 U.S. 677. The case of *Reg.* v. *Keyn* (1876), 2 Ex. D. 63, which is often cited as an exception to the general rule, will be dealt with below. The principle has also been taken over by parts of the British Commonwealth on attaining self-government or independence. Art. 29, para. 3, of the Irish Constitution provides that Eire accepts the generally recognized principles of international law as its rule of conduct in its relations with other states (see also *Annual Digest*, 1943–5, Case No. 25). Australia, it was stated in the recent case of *Wright* v. *Cantrell* (*Annual Digest*, 1943–5, Case No. 37), recognizes international law as part of the law of the land. Canadian acceptance of the principle was affirmed in *The King* v. *The Ship North* (1906), 37 S.C.R. 385, particularly at p. 394.

[4] (1878), *Clunet*, 5 (1878), p. 500. The Court also relied in part on legislative provisions. For other French cases see Masters, op. cit., pp. 175 ff.

[5] (1882), quoted by Masters, op. cit., p. 40. See also *Von Hellfeld* v. *Russian Government*, *American Journal of International Law*, 5 (1911), pp. 490 ff.; and *Bardorf* v. *Belgien*, *R.G.Z.* 62, p. 165.

[6] *B.G.E.* 44, i, p. 49. For cases of the application of rules of international law in Swiss courts without discussion of the reasons see Masters, op. cit., p. 110; *B.G.E.* 56, i, p. 237; *B.G.E.* 57, ii, p. 550.

Bundesgericht said of the rule of state immunity that, 'by its nature, it requires municipal enforcement, and must accordingly be assimilated to municipal law'. A Greek court has given emphatic support to the doctrine.[1] Dutch, Belgian, Polish, and Danish courts have also given effect to the doctrine of adoption.[2] In many countries the matter is, moreover, regulated by constitutional provisions. Article 10 of the Italian Constitution of 27 December 1947 provides that 'Italian law shall be in conformity with the generally recognized rules of international law'. In very similar language the Preamble of the French Constitution of 27 October 1946[3] provides that 'La République Française se conforme aux règles du droit public international'. The *Grundgesetz für die Bundesrepublik Deutschland* of 1949 provides, in Article 25: 'The general rules of international law are part of the law of the Federation. They are superior to federal laws and create rights and duties directly for the inhabitants of federal territory.'[4] The Constitution of the East German Republic of 7 October 1949 provides as follows: 'The generally recognised rules of international law are binding on the authorities of the State and on every citizen.' Similar provisions can be found in the constitutions of several German states.[5] Article 9 of the Austrian Constitution of 1 October 1920, which was again brought into force by the *Verfassungsüberleitungsgesetz* of 1 May 1945, provides that the generally recognized rules of international law are part of the law of the Republic.[6]

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[1] *L.* v. *N.*, *Thémis*, 1947, pp. 210–13: 'The rules contained in the Hague Conventions are principles of customary international law which are binding even on countries like Greece which are not parties to them, seeing that, by constitutional usage, these rules are a source of national law in accordance with the generally accepted custom that generally recognized rules of international law have the force of national law.'

[2] On Holland see Schurmann in *Transactions of the Grotius Society*, 30 (1944), p. 34; on Polish practice see Kuratowski, ibid., pp. 40–42; and in *Clunet*, 66 (1939), p. 767; on Belgian practice see the *Marriage Contract* case, *Clunet*, 32 (1905), p. 416; ibid., 33 (1906), p. 481; on Danish practice see *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States.*

[3] *Sirey*, 1947, *Lois*, p. 545. It is not entirely beyond doubt that this provision refers to the matter here under discussion. But the similarity of language to Art. 7 of the Spanish Constitution of 1931, which undoubtedly did deal with this subject, is significant: 'L'État espagnol respectera les règles universelles du Droit International, en les incorporant en son droit positif.' See on this point Donnedieu de Vabres in *Dalloz*, 1948, *Chronique*, p. 5.

[4] See also the similar provision of Art. 4 of the Weimar Constitution of 1919: 'The generally recognized rules of international law are valid as binding constituent parts of German federal law.' For cases applying that article see, e.g., *Annual Digest*, 1925–6, Case No. 244; *R.G.Z.* 103, p. 274; *R.G.Str.* 60, p. 202.

[5] Art. 8 of the Constitution of Bavaria of 6 December 1946; Art. 67 of the Constitution of Hesse of 1 December 1946; Art. 46 of the Constitution of Württemberg-Baden of 24 November 1946; Art. 122 of the Constitution of Bremen; Art. 7 of the Constitution of Württemberg-Hohenzollern; Art. 57, para. 2, of the Constitution of Mecklenburg; Art. 60, para. 2, of the Constitution of Sachsen-Anhalt; Art. 68, para. 1, of the Constitution of Saxony; Art. 42 of the Constitution of Thüringen; Art. 57, para. 3, of the Constitution of Brandenburg.

[6] See, for an application of this provision, *Austrian Treasury* (*Postal Administration*) v. *Auer*, decided by the Austrian Supreme Court on 1 October 1947. See also *Annual Digest*, 1927–8, Case No. 113. The Project relating to the Fundamental Bases of International Law, drawn up by the International Committee of American Jurists in 1927, contains a provision that 'positive

One controversial question with regard to the 'adoption' of customary international law must here be clarified, namely, the question as to what is meant by 'rules of customary international law'. Most courts and constitutional provisions on the subject speak of 'generally recognized' rules of international law. But some difficulty has been caused by the view that a rule of international law is not 'generally recognized' if the country in which it is to be applied has in any way indicated that it does not accept that rule, or even if it has not positively recognized it. Thus the German Reichsfinanzhof stated, in 1921, in the *Goldtax* case: 'A generally recognised rule of international law must be one that has been recognized by Germany.'[1] A similar attitude is implied in the statement of Warrington L.J. in the case of *In re Ferdinand, ex-Tsar of Bulgaria*,[2] to the effect that the right of confiscating enemy property could only be defeated by 'some rule or usage . . . accepted as binding by civilised states generally and by our own Government in particular'. Such an attitude could, to some extent, defeat the advantages of the doctrine of adoption, for it leaves the interested state a certain amount of discretion in the acceptance of rules of international law which it has not previously had occasion to recognize. A more balanced view of the matter would seem to be that expressed by Lord Alverstone in a famous passage from his judgment in the case of *West Rand Central Gold Mining Co.* v. *The King*:[3]

> 'It is quite true that whatever has received the common consent of civilised nations must have received the consent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals. . . . The international law sought to be applied must . . . be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, *or that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilised state would repudiate it*.'[4, 5]

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international law forms part of the law of every state. . . .' The International Law Commission was not prepared to state that customary international law was in all countries regarded as part of the law of the land. See Doc. A/CN.4/SR. 14, pp. 5–6.

[1] *R.F.E.* 7, p. 102. See also *Bericht und Protokoll des* 8 *Ausschusses über den Entwurf einer Verfassung des Deutschen Reiches*, 3rd Session, p. 9; ibid., 36th Session, pp. 12–13. But see the case of *Von Hellfeld* v. *Russian Government* (*American Journal of International Law*, 5 (1911), pp. 490 ff).

[2] [1921] 1 Ch. 107 at p. 137. See also *K.K. Oesterreichisches Finanzministerium* v. *Dreyfus*, decided by the Swiss Bundesgericht in 1918 (quoting the view of a lower court): *B.G.E.* 44, i, p. 49, at p. 51. Swiss courts, in general, seem to have been satisfied by evidence of foreign state practice.

[3] [1905] 2 K.B. 391, at 406.

[4] Italics are the writer's.

[5] Attention has been drawn to the fact that while Art. 4 of the Weimar Constitution spoke of the 'allgemein anerkannten Regeln des Völkerrechts', Art. 25 of the new Grundgesetz speaks of 'die allgemeinen Regeln des Völkerrechts', thus eliminating the element of recognition. See Mann, in *Süddeutsche Juristenzeitung*, 5, No. 8 (August 1950), p. 247. And see, for a discussion of this problem, Jellinek in *Um Recht und Gerechtigkeit, Festgabe für Erich Kaufmann* (1950), pp. 181 ff.

Treaties, also, are now 'adopted' in many countries, i.e. they are made part of national law without a process of specific transformation. Article 6 of the Constitution of the United States provides that 'all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or law of any State to the contrary notwithstanding'. In *Amaya* v. *Stanolind Oil and Gas Co.*[1] a Circuit Court of Appeals summarized the main aspects of that provision as follows: (*a*) Treaties have the same authority as the Constitution and the laws of the United States;[2] (*b*) Treaties are self-operating: they do not require legislation for their municipal effectiveness, but are, of themselves, part of the law of the land;[3] (*c*) Treaties are part of the law of the component states of the Union and override their powers with regard to private relations.[4] Similarly, in France treaties are directly applicable to private relations.[5] They have the same authority as legislative enactments and thus automatically override earlier laws.[6] This has been specifically laid down in Article 26 of the Constitution of 27 October 1946:

> 'Les traités diplomatiques régulièrement ratifiés et publiés ont force de loi dans le cas même où ils seraient contraires à des lois internes françaises, sans qu'il soit besoin pour en assurer l'application d'autres dispositions législatives que celles qui auraient été nécessaires pour assurer leur ratification.'[7]

In Switzerland, also, treaties are directly binding on individuals,[8] and overrule earlier statutes.[1] As in the United States, moreover, treaties in Switzerland override cantonal law.[2] The Spanish Constitution of 9 December 1931 provided in Article 65 as follows:

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[1] 27 December 1946: 158 F. (2d) 554.

[2] See *Foster* v. *Neilson*, 2 Pet. 253. It follows that treaties override pre-existing law. Administrative regulations which conflict with a treaty are void as contravening the law of the land. See *Shigulo Kumanomido* v. *Nagle*, 40 F. (2d) 42, 44; *U.S. ex rel. Goodwin* v. *Karnuth* (1947), 74 F. Supp. 660.

[3] See also *Annual Digest*, 1941–2, Case No. 127; ibid., 1938–40, Case No. 60; ibid., 1919–42, Case No. 2; ibid., 1935–7, Case No. 167; ibid., 1933–4, Cases No. 85 and 112; ibid., 1923–4, Case No. 182; *Head Money* cases, 112 U.S. 580.

[4] See also *Clark* v. *Allen* (1947), 331 U.S. 503; *Antosz* v. *State Compensation Commissioner* (1947), 43 S.E. (2d) 397; *People* v. *Oyama et al.* (1948), 332 U.S. 633; *Annual Digest*, 1941–2, Cases No. 13, 89, and 126; ibid., 1938–40, Cases No. 123 and 192; ibid., 1919–42, Case No. 1; ibid., 1935–7, Cases No. 15 and 198; ibid., 1931–2, Case No. 212; ibid., 1923–4, Cases No. 182 and 183; ibid., 1919–22, Cases No. 1, 2, 231, and 252; *Sei Fujii* v. *The State* (1950), 217 F. (2d) 481.

[5] See, e.g., *Annual Digest*, 1933–4, Case No. 32; ibid., 1929–30, Case No. 12.

[6] See, for cases referring to the Constitution of 1875, Masters, op. cit., pp. 138–46; *Sirey*, 1936, Part i, p. 151; ibid., 1942, Part i, p. 44. And see above, pp. 55–56. There are some *dicta* suggesting that treaties involving a modification of French law then required legislative approval.

[7] *Sirey*, 1947, *Lois Annotées*, p. 562. And see *Capello* v. *Marie* (*Revue critique de droit international privé*, 37 (1948), p. 491); and *Re Soc. C.O.M.I.N.F.I.* (*Sirey*, 1950, Part iii, p. 55).

[8] See *B.G.E.* 38, i, p. 551, at p. 603; *B.G.E.* 64, i, p. 268; *B.G.E.* 35, i, p. 415; *B.G.E.* 27, i, p. 192; *B.G.E.* 10, pp. 583–5. In the case of *Lepeschkin* v. *Obergericht Zürich* (*B.G.E.* 49, i, p. 188) the Swiss Bundesgericht justified its continued application of a treaty despite its non-performance by the other party by reference to the fact that municipal courts did not apply the treaty, as such, but municipal law created by the legislative approval necessary for the ratification of the treaty. This statement has been strongly criticized (see, e.g., Guggenheim, *Lehrbuch des Völkerrechts*, vol. i (1947)) on the ground that it misrepresents Swiss practice, and that it was unnecessary for the decision, for even in the international sphere treaties do not automatically lapse

> 'All international conventions ratified by Spain and registered with the League of Nations, which have the character of international law, shall be considered to be an integral part of Spanish law, which must comply with their provisions.'[3]

This provision was given emphatic application by the Spanish Supreme Court in the case of *Fiscal* v. *Samper*, decided in 1934, in which it was held that an extradition treaty was 'of sufficient force to regulate the matter which it covers not only as to the international relations between the contracting states, but also as to the juridical situation of those extradited', and that the national penal laws must be subordinated to its provisions.[4] In Holland it has been established since a decision of the Supreme Court of 25 May 1906,[5] that treaties which have been regularly ratified and promulgated are binding upon courts and individuals without further transformation into municipal legislation. It has also been held that such treaties derogate from earlier municipal laws.[6] Similarly, the Supreme Court of Czechoslovakia held, on 10 June 1938, in the *Imperial Estates* case, that a treaty concluded in accordance with constitutional procedure was binding on state organs and individuals without any further legislation.[7] That is true also of the practice of some Latin-American states. The Argentine Constitution of 1860 provides, in Article 31: 'This Constitution, the laws of the nation enacted by Congress and treaties with foreign powers are the supreme law of the nation.' Accordingly, in the case of *Montero* v. *Fernandez*,[8] it was held that, under that provision, treaties automatically overrode pre-existing law. Similarly, the Cuban Supreme Court held in 1930 that a treaty 'once approved in legal form by the signatory states has for their courts and citizens the same obligatory force as the national laws.'[9]

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owing to non-performance, but are only subject to denunciation by the political organs of the injured states. In the case of *Helvetia* v. *Kuch and Frauenberger-Kuch* (*Annual Digest*, 1946), decided by the same Court on 15 April 1946, it was held, on very similar facts, that the decision in the case of *Lepeschkin* was only one possible construction, and that the same result is obtained 'if we assume with Burckhardt that a treaty concluded by the Federal Council and recognized as being internationally binding is automatically valid within the State'.

[1] See *B.G.E.* 59, ii, p. 337; *B.G.E.* 10, pp. 583–5.

[2] See *B.G.E.* 3, p. 286; *B.G.E.* 7, p. 782; and, in particular, *B.G.E.* 24, i, p. 318. Art. 113 of the Constitution of 1874 gives the Bundesgericht jurisdiction over cases in which a treaty has been violated by a cantonal authority, whether legislative, executive, or judicial.

[3] Cited by Mirkine-Guetzévitch in *R.G.* 52 (1948), p. 377.

[4] *Annual Digest*, 1938–40, Case No. 152.

[5] See a note by Verzijl in ibid., 1931–2, p. 354.

[6] Ibid., 1931–2, Case No. 199.

[7] Ibid., 1938–40, Case No. 185. See also ibid., 1925–6, p. 8, note. Contrast the decisions of the Czechoslovak Supreme Administrative Court discussed above, at p. 53.

[8] Ibid., 1938–40, Case No. 188.

[9] Ibid., 1929–30, Case No. 219. Apparently in the nineteenth century, at any rate, the Chinese Government also subscribed to the view that treaties form part of the law of the land. See *Parliamentary Papers*, 1864, vol. lxiii, p. 413 (Cmd. 3406), Enclosure 2, p. 2.

International law is thus made more freely operative within the state than under the doctrine of transformation. The further legal consequences of the monistic approach are also more in accordance with the supremacy of international law than those which are the result of the dualist attitude. The enforcement of the terms of a treaty cannot be hindered by the different terminology of an enabling act. Thus in *First National Bank of Pittsburg* v. *Anglo-Oesterreichische Bank*[1] a United States Court held that war with Austria was terminated on the date specified in the Treaty of Peace, not on the date given in the Presidential proclamation promulgating the treaty: 'the proclamation cannot vary the terms of the treaty itself.' Again, in Germany—where, it has been suggested above, the law is not genuinely dualist—courts have shown remarkable unanimity that the provisions of treaties must be interpreted, not in accordance with the national rules of statutory interpretation, but by reference to international rules and the intention of the parties.[2] A similar attitude was adopted by the Court of Appeal of Orleans in a decision of 6 April 1948.[3] It held that for the purpose of interpreting the term 'immovable property' in the Fourth Hague Convention, the purely French institution of 'immeuble par destination' could not be invoked. Moreover, it has been accepted in many countries that treaty provisions can have no independent operation in the municipal sphere—they come into force and lapse together with the international treaty. This was stressed emphatically by the Court of Appeal of Paris in its decision in the case of *Renault et Société des Usines Renault* v. *Société Rousski Renault*.[4] In rejecting the contention of the defendant that the provisions of the Hague Convention of 1905 were still operative in France because they had not been repealed by the legislature, although the treaty had been denounced as between France and Russia, the Court said:

> 'Le Président de la République négocie et ratifie les traités . . . l'intervention du pouvoir législatif n'a ici d'autre objet que d'autoriser le Président de la République à ratifier les traités et à les rendre exécutoires en les promulguant; . . . c'est aussi à lui seul qu'il appartient, dans la plénitude de ses attributions propres, et à l'exclusion du pouvoir législatif, . . . de les dénoncer pour y mettre fin ou d'en suspendre seulement les effets . . .; le Président de la République agit en la matière comme chef du pouvoir exécutif; . . . il accomplit . . . un acte gouvernemental au premier chef, et l'autorité judiciaire n'a qu'à en prendre acte pour en faire état dans sa teneur . . . .'

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[1] *Annual Digest*, 1919–42, Case No. 148.

[2] *R.G.Z.* 149, p. 83; *R.G.Z.* 146, p. 325; *R.G.Z.* 142, p. 241; *R.G.Z.* 140, p. 353; *R.G.Z.* 137, p. 1; *R.G.Z.* 131, p. 250; *R.G.Z.* 130, p. 220; *Juristische Wochenschrift*, 1932, p. 243.

[3] *Revue critique de droit international privé*, 37 (1948), p. 311. But see for some French cases to the contrary effect, Masters, op. cit., p. 165.

[4] *Sirey*, 1927, Part ii, p. 1. See also *C.A.M.A.T.* v. *Scagni* (1946), *Revue critique de droit international privé*, 36 (1947), p. 294. For Italian cases to this effect, cited above in connexion with the importance to be attached to promulgation, see *Annual Digest*, 1925–6, Case No. 256, and *Procedura Penale Italiana*, 1927, p. 318. For German cases see *Annual Digest*, 1931–2, Case No. 196; ibid., 1933–4, Case No. 183; *R.G.Z.* 124, p. 204.

The widespread acceptance of the doctrine of adoption—in particular, it has been shown, with regard to customary international law, but also increasingly with regard to treaties—thus represents an advance from the point of view of the supremacy of international law. But the 'adoption' of international law is not tantamount to its supremacy within the state. In the first instance, it has been shown above, the adoption of international law is dependent on positive provisions of national law. Secondly, it will have appeared from this brief review of national laws on the subject that international law is in most countries given a standing equal—not superior—to national legislative enactments. This means that national law is still in the position to impose extensive limitations on the enforcement of international law in the municipal sphere, which operate alike in countries wedded to the dualist view of the relation of international law and municipal law, and in countries which follow the monist approach. These limitations will now be discussed.

III. *Limitations on the enforcement of international law within the state*

(*a*) *Non-self-executing provisions of international law*

We must begin with a limitation on the enforcement of international law within the state which is apparent rather than real. In general, the existence of 'non-self-executing' provisions of international law need not be regarded as an obstacle to the supremacy of international law in the municipal sphere. 'Non-self-executing'—a misleading phrase, because it suggests that the rules have no effect at all—is customarily applied to rules of international law which are expressly intended to be binding only as between states, not within the state. There is no reason why international law should not contain such rules, which are not suitable for direct application to the conduct of individuals within the state.

The phraseology of many treaties clearly reflects the intention of the parties that certain provisions should not be directly operative within the state.[1] Thus the Fourth Hague Convention of 1907 provided, in Article 1, as follows:

> 'The High Contracting Parties will issue to their armed land forces instructions which shall be in conformity with the "Regulations respecting the Laws and Customs of War on Land" annexed to the present Convention.'[2]

Similarly, the Geneva Convention of 1929 on the Amelioration of the Condition of Sick and Wounded provided, in Article 28, that

> 'The Governments of the High Contracting Parties whose legislation is not at

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[1] See *Foster* v. *Neilson*, 2 Pet. 253. *Ex parte Dove, Annual Digest*, 1931–2, Case No. 192; *Robertson* v. *General Electric Co.*, ibid., 1927–8, Case No. 284. And see Dickinson in *American Journal of International Law*, 20 (1926), p. 448.

[2] See on this a recent Dutch case, *Re Contractors Knols, N.O.R.*, 3rd year, 1947, No. 725.

present adequate for the purpose, shall adopt and propose to their legislatures the measures necessary to prevent at all times:

(*a*) The use of the emblem or designation 'Red Cross' or 'Geneva Cross' by private individuals. . . .'

That provision, it was held in a Dutch case, produced no direct effect in the national sphere: 'The Convention . . . does not contain any penal provision; it merely imposes upon the national authorities the duty to bring such a provision into being.'[1] Again, it has often been held, with some justification, that provisions in treaties for the indemnification of private individuals, as a result of international awards or otherwise, are not immediately enforceable within the state because they must be supplemented by legislation providing for the modalities of payment.[2] In such cases the treaty provisions in question are considered to be too general in tenor to be capable of direct enforcement in municipal courts. Moreover, in many countries rules of customary international law and treaties conferring rights upon states, in particular in connexion with the exercise of jurisdiction, are not enforced within the state until there has been some indication on the part of the legislature that it is willing to exercise those rights. In the case of *Reg.* v. *Keyn*[3] Cockburn C.J. stated: 'The assent of the nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law. . . .' The views expressed in that—frequently misquoted—case to the effect that jurisdiction over territorial waters could not be exercised even if there were a rule of international law authorizing the exercise of such a jurisdiction, seems to have been based on two assumptions: first, that such rules of international law are permissive and not mandatory, and secondly, that, again, they are too general in tenor to be capable of immediate enforcement and require to be supplemented by detailed rules vesting jurisdiction in particular organs. This latter aspect was recently illustrated in the Dutch case of *In re S.S. member Ahlbrecht*,[4] where it was held that:

'. . . it could no longer be said that the Kingdom of the Netherlands lacked jurisdiction over enemy war criminals. It did not, however, follow from this conclusion that in the actual state of Dutch legislation any particular Netherlands Court could automatically have jurisdiction over enemy war criminals. . . .'

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[1] *Annual Digest*, 1933–4, Case No. 220.

[2] See, e.g., *R.G.Z.* 121, p. 7; and *R.G.Z.* 119, p. 156, on the enforcement of the provision of the Treaty of Versailles to the effect that Germany would indemnify German nationals for losses caused to them by the operation of that Treaty. See also *Civilian War Claimants Association* v. *The King*, [1932] A.C. 14, at p. 24. But see *American-Mexican Claims Bureau Inc.* v. *Morgenthau*, *Annual Digest*, 1938–40, Case No. 106.

[3] (1876), 2 Ex.D. 63, at p. 202. See also some American cases relating to rights of seizure on the high seas granted by treaty which were not paralleled by the extension of jurisdiction under municipal penal law: *Annual Digest*, 1925–6, Cases No. 106, 107, 108, and 109. And see, for a criticism of these decisions, Dickinson in *American Journal of International Law*, 20 (1926), pp. 444–52.

[4] *N.J.*, 1947, No. 87.

Admittedly, the existence of non-self-executing provisions of international law can lead to abuse. It opens up the possibility, in countries where the 'adoption' of international law is the dominant principle, of requiring the 'transformation' of treaties and customary international law by interpreting the concept of a non-self-executing provision extensively. If, as has been suggested above,[1] treaties requiring an appropriation of money are in the United States[2] regarded as 'non-self-executing', then such a practice is all but tantamount to the requirement of transformation of treaties which burden the state.[3] Moreover, it has been too lightly assumed that states are free not to act upon so-called permissive rules of international law. The rights of states, in particular with regard to jurisdiction, often carry with them also certain duties of protection; thus it is not certain that it was immaterial from the point of view of international law whether Great Britain in 1876 made use of her right under international law to exercise jurisdiction over territorial waters. But these are objections to the interpretation placed on the concept of the non-self-governing provision in individual cases, not to the principle as such.

(*b*) *Municipal law in conflict with international law*

A much more serious limitation on the enforcement of international law in the municipal sphere is the fact that municipal law which is in conflict with a rule of international law will often be given effect in municipal courts. This is usually ascribed to the fact that municipal courts are the organs of municipal law and are bound by it in all circumstances. That statement, however, is only part of the wider truth that within the state, in general, international law is applicable only so far as is permitted by municipal law and, therefore, by implication, subject to the limitations imposed upon that operation by municipal legislative organs.[4] Within the scope of positive law a further element is the fact, noted above, that international law is in most countries given the standing of a legislative enactment and is thus subject to repeal by later legislation. This is particularly significant in countries where a written constitution, unlike international law, is given a standing superior to ordinary legislative enactments.[5] Such a constitution is not subject to repeal by ordinary legislation; moreover, it often confers upon the highest municipal court the power to set aside legislation which is in conflict with the principles of the constitution.

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[1] See p. 55.

[2] Where the doctrine of the non-self-executing provision has been of the greatest importance, partly because it was the first country to apply the doctrine of adoption to treaties.

[3] The interpretation placed upon the terms of a treaty by such an enabling act will be regarded by the courts as decisive (*Foster* v. *Neilson, supra*).

[4] This is probably the meaning of the sweeping statement of a United States court in a recent case: 'international law is not in itself binding upon Congress' (*Annual Digest*, 1919–42 (Supplementary Volume), Case No. 100).

[5] See, for the United States, *Marbury* v. *Madison* (1803), 1 Cranch 137, 176–8.

The conclusion that a later statute overrides a treaty follows logically in countries which apply the doctrine of transformation, with which we are not here primarily concerned. If the provisions of treaties are only applied within the state in so far as they have been embodied in a legislative enactment, a question of conflict between international law and municipal law cannot genuinely arise within the municipal sphere. There is only a conflict between two provisions of national law, which is usually solved by reference to the principle *lex posterior derogat priori*. This was the view put forward by the legislative committee which drafted the German Civil Code during the period of the Empire:

> 'Treaties obtain their obligatory force within the state and thereby the character of objective law only through their publication as statutes and can, regardless of their binding force on the state in international law, be divested of this character by a subsequent statute.'[1]

The same principle is, however, applied in countries where treaties are directly enforceable within the state. In the United States it is uniformly accepted that a later legislative enactment overrides the provisions of a treaty. Thus in *Whitney* v. *Robertson*[2] it was held:

> 'By the Constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. . . . If the two are inconsistent the one last in date will control the other. . . . If the country with which the treaty is made is dissatisfied with the action of the legislative department it may present its complaint to the executive head of the Government. . . . The Courts can afford no redress. . . .'

This is so whether the later legislation repeals the treaty expressly[3] or by implication.[4] Similarly, in France, under the Third Republic,[5] courts on several occasions applied laws[1] although they conflicted with earlier treaties.[2] Swiss courts have, on occasion, supported a similar view. In the case of *Steenworden* v. *Société des Auteurs*[3] the Swiss Bundesgericht held that 'a subsequent treaty abrogates by operation of law all conflicting provisions of a prior statute, and, conversely, a subsequent statute excludes the application in Switzerland of conflicting provisions of a previous treaty'.[4]

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[1] Quoted in Masters, op. cit., p. 34; see also *R.G. Str.* 4, p. 271, *R.F.E.*, 3. 14; see further a decision of the Yugoslav Court of Cassation (*Annual Digest*, 1925–6, Case No. 262). And see *Moore* v. *Att.-Gen. of the Irish Free State*, [1935] A.C. 484; *Schieble* v. *Procurator-General of Brussels*, *Annual Digest*, 1925–6, Case No. 6. And see in particular the decision of the Judicial Committee of the Privy Council in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*, [1941] A.C. 308.

[2] (1887), 124 U.S. 190. See also, for early authorities, *Hijo* v. *United States* (1904), 194 U.S. 315, 324; *Thomas* v. *Gay*, 109 U.S. 264; *Chinese Exclusion* case, 130 U.S. 581; *Taylor* v. *Morton* (1855), 2 Curtis 454; *Clinton Bridge* case (1867), 1 Woolworth 150; *Cherokee Tobacco* case (1870), 11 Wallace 616; *Ropes* v. *Clinch* (1871), 8 Blatchf. 304; *Head Money* cases (1884), 112 U.S. 580. For recent instances see *United States ex rel. Goodwin* v. *Karnuth* (1947), 74 F. Supp. 660; *United States* v. *Claus* (1944), 63 F. Supp. 433; *Watson* v. *Hoey* (1943), 59 F. Supp. 197; *Summertime* v. *Local Board*, 248 F. 832; *Totus* v. *United States*, 39 F. Supp. 7. The following cases to the same effect can be found in the volumes of the *Annual Digest*: 1935–7, Cases No. 3, 57; 1941–2, Cases No. 1, 38, 128, 176; 1919–42, Cases No. 3 and 100.

[3] Ibid., 1919–42, (Supplementary Volume) Case No. 60.

[4] Ibid., 1919–22, Case No. 236. Repeal by implication is not favoured (ibid., 1933–4, Case No. 199).

[5] On the Constitution of the Fourth Republic see below, p. 89.

Moreover, it has been held in most countries that national legislative enactments override rules of customary international law with which they are in conflict. English authorities on the subject consist mainly of *dicta*, but these have been emphatic.[5] In recent years, moreover, the doctrine of the supremacy of national legislative enactments has received emphatic affirmation in the courts of several Commonwealth countries. In *Polites* v. *The Commonwealth*[6] the High Court of Australia upheld the validity of Regulations made in pursuance of a statute for the conscription of aliens, although it recognized that these were contrary to an established rule of international law. In *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*[7] the Judicial Committee of the Privy Council, sitting as a Court of Appeal from Canada, held that it was unable to construe the War Measures Act in accordance with international law, and must therefore apply it in a manner inconsistent with it. The Federal Court of India held, *obiter*, in *Mohammad Mohy-ud-Din* v. *The King Emperor*[8] that statutes must be applied so as to derogate from rules of international law if the intention of the legislature to that effect is clear.

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[1] Mere decrees, apparently, could not supersede a treaty which had the force of law. See *Milani* v. *Ministère public*, *Clunet*, 24 (1897), p. 559.

[2] *Daude* v. *Johann Faber*, *Clunet*, 43 (1916), p. 1303; *Chenouard* v. *Denis*, ibid., 54 (1927), p. 420; *Rockwell* v. *Leroy*, *Gazette du Palais*, 1927, vol. i, p. 96; *Fransioli* v. *Alcalay*, *Clunet*, 55 (1928), p. 391; *Annual Digest*, 1929–30, Case No. 153; *Vicens* v. *Bonfillon*, *Revue de droit international privé*, 28 (1933), p. 480; *Tissot* v. *Isabelle*, ibid., p. 478; *Spilka* v. *Lerche*, ibid., p. 475.

[3] *Annual Digest*, 1935–7, Case No. 4. See on that case *Revue critique de droit international*, 1938, pp. 252 ff., and *R.D.I.L.C.*, 1937, p. 95, nn. 11, 12, and 13.

[4] See also, for Italian practice, *Publico Ministero* v. *Benedetti* (1946), *Foro Italiano*, 1947, vol. i, p. 370; *Mariano* v. *Basso*, *Rivista di Diritto Internationale*, 1931, p. 73; for Polish practice, *Annual Digest*, 1927–8, Case No. 282, and ibid., 1933–4, Case No. 5; for German practice, *R.G.Str.* 67, p. 130; for Greek practice, *Annual Digest*, 1931–2, Case No. 4; for Belgian practice, *Pasicrisie Belge*, 1926, vol. i, p. 76; for Roumanian practice, *Pand. Rom.*, 1937, vol. i, p. 123. And see *Preparatory Study concerning a Draft Declaration on the Rights and Duties of States*, p. 87.

[5] See, e.g., *Reg.* v. *Keyn* (1876), 2 Ex. Div. 63, *per* Cockburn C.J.; *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 A.C. 394; *Mortensen* v. *Peters* (1906), 14 S.L.J. 227, *per* Lord Dunedin. A delegated legislative power in violation of international law is *ultra vires* and invalid (*Molvan* v. *Att.-Gen. for Palestine*, [1948] A.C. 351; *Croft* v. *Dunphy*, [1933] A.C. 156, 164).

[6] *Annual Digest*, 1943–5, Case No. 61, particularly at pp. 215–16. See also a *dictum* in *Wright* v. *Cantrell*, ibid., Case No. 37.

[7] [1947] A.C. 87. See also an *obiter dictum* in *Rex* v. *Rose*, decided by the Court of King's Bench of Quebec (Appeal Side), [1947] 3 D.L.R. 618: 'A state may, it is clear, extend or restrict the vague and imprecise authority of international law. It may derogate from it or amplify it by special legislation. . . .' And see *In the Matter of a Reference as to the Powers of the City of Ottawa . . . to Levy Rates on Foreign Legations*, *Annual Digest*, 1941–2, Case No. 106.

[8] (1946), 8 F.C.R. 94.

The courts of the United States, too, have given repeated expression to this view. In one of the most recent instances, *The Over the Top*,[1] it was said, in an emphatic *dictum*, that international law, 'like customary or written law, must give way before the sovereign will of Congress'. In Germany the *Reichsfinanzhof* held, on 8 August 1928, that

> 'even assuming that the *Aufbringungsgesetz* were from this point of view not in accordance with international law, it would still have to be applied by the Courts notwithstanding Article 4 of the Constitution. It was a special law, and would, in accordance with the rule *lex posterior derogat priori*, derogate from any general rule of international law or indeed from any other Federal law, with which it might conflict.'[2]

French courts, under the Third Republic, also provided some instances of this view.[3]

It has even been suggested that treaties which conflict with pre-existing municipal law of superior standing, i.e. with constitutional provisions, cannot be binding within the state. However, we must distinguish here between two questions arising out of this issue. It is doubtful, firstly, whether treaties concluded in violation of constitutional provisions relating to procedure can acquire validity in the international sphere, i.e. whether they must not be considered to have been concluded by an incompetent authority.[4] With this question we are not here concerned. The second issue is whether municipal courts will refuse to enforce a treaty which has acquired international validity and which conflicts, in content, with a constitutional provision. The subject has aroused much speculation in the United States.[5] There have been several emphatic *dicta* by courts to the effect that a treaty could not change the Constitution or be held valid if it were in violation of that instrument.[6] At the same time no treaty has, as yet, been declared unconstitutional. There have, moreover, been decisions giving effect to treaties which affected fundamental provisions of the constitution. Thus it has been laid down that treaties can infringe the 'reserved' rights of the component states of the Union.[1] It has also been suggested that treaties have been enforced which affected the acquired rights of individuals.[2] These cases have been explained by reference to the fact that there was a concession to the treaty-making power, prior to or at the time of the drafting of the constitution, of authority to deal with all matters. The possibility that a treaty may be held by a court to violate the constitution would thus appear to be largely theoretical.[3]

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[1] (1925), 5 F. (2d) 838, 842. See also *The Nereide* (1815), 9 Cranch, at p. 423 (*per* Marshall C.J.); *The Marianna Flora* (1826), 11 Wh. 1, 39 (*per* Story C.J.); *United States* v. *La Ninfa*, 49 Fed. Rep. 575; *United States* v. *The James G. Swan*, 20 Fed. Rep. 108; *United States* v. *The Alexander*, 60 Fed. Rep. 914; *In re Cooper* (1892), 143 U.S. 472; *Kestor* case (1901), 116 Fed. Rep. 432; *United States* v. *Bell* (1919), 248 Fed. Rep. 992, 995; *Littlejohn and Co.* v. *United States* (1926), 270 U.S. 215, 227.

[2] *Annual Digest*, 1927–8, Case No. 225.

[3] See *Clunet*, 42 (1915), p. 669; ibid., 44 (1917), pp. 238 and 248. The decisions may have been justified in the mind of the courts as reprisals, as were, expressly, other decisions on similar facts (*Clunet*, 42 (1915), pp. 903 and 1120; ibid., 44 (1917), p. 241; *Sirey*, 1920, Part ii, p. 20).

And see the decision of the Polish Supreme Court in *Sazonow* v. *District Land Board* (1922), *Annual Digest*, 1919–22, Case No. 3.

[4] See Mervyn Jones in *American Journal of International Law*, 35 (1941), pp. 462 ff.; Fitzmaurice in this *Year Book*, 15 (1934); and *Harvard Research on Treaties* (1935), pp. 992–1009. And see a discussion on this subject in the International Law Commission in 1949: A/CN.4/SR. 14, p. 3. Most writers on the subject make the distinction, indicated in the text, between constitutional provisions relating to the procedure of the conclusion of treaties, and provisions which may conflict with the content of the treaty. Only the former, it is usually held, can be of relevance in the international sphere.

[5] See, e.g., Pinto in *La Technique et les principes du droit public: études en l'honneur de Georges Scelle*, 1950, vol. i, pp. 439 ff.; Cowles, *Treaties and Constitutional Law* (1941); Potter in *American Journal of International Law*, 28 (1934); Anderson, ibid., 1 (1907), pp. 636 ff.

[6] *The Cherokee Tobacco Co.* v. *United States* (1870), 11 Wall. 616; *In re Beale, Annual Digest*, 1933–4, Case No. 2; *Geofroy* v. *Riggs* (1899), 133 U.S. 258; *Holden* v. *Joy*, 17 Wall. 242.

Even so, however, the limitation on the operation of international law in this connexion is far-reaching. This is particularly striking in relation to the activity of prize courts. A prize court, it has often been held, is 'a Court of the law of nations only, not intended to carry into effect the municipal law of this or any other country'.[4] Nevertheless it has been recognized that prize courts are bound by the legislative enactments of their state. Thus in *The Zamora* the Judicial Committee of the Privy Council held that 'a British Prize Court would certainly be bound by Acts of the Imperial Legislature'.[5] A great deal of attention has been paid to the decision, in the same case, to the effect that Orders in Council cannot lay down law to be applied by the prize court.[6] That conclusion, although justified by reference to the fact that a prize court administers international law, was primarily based on the view that

And see the views of the Secretary of State Marcy in connexion with the *Dillon* case, in which a French consul was imprisoned for refusing to comply with a subpoena although he was entitled to do so under a consular convention (Moore, *Digest* (1906), vol. v, p. 767). The right to subpoena witnesses is given by the Constitution.

[1] *Missouri* v. *Holland* (1920), 252 U.S. 416; *United States* v. *Curtiss Wright Export Corporation* (1936), 299 U.S. 304.

[2] Pinto, loc. cit., relying on *United States* v. *Pink* (1942), 315 U.S. 203; *Ware* v. *Hylton* (1796), 3 Dall. 199.

The fact that treaties affected by the division of powers between the political organs of the United States require action by Congress before becoming enforceable within the state is not here in point. The fact that treaties cannot be directly enforced is not due to these being in *conflict* with the constitution.

[3] See also *Annual Digest*, 1927–8, Case No. 282, for a decision of the Supreme Court of Colombia to the effect that it was not competent to review the conformity of a treaty with the provisions of the Constitution. In a Belgian case the Court of Appeal of Brussels held that a treaty concluded in pursuance of an international custom was valid even if in violation of constitutional provisions regarding the conclusion of treaties (*Clunet*, 1905, p. 416). The Court of Cassation found that the treaty in that case did not violate the constitution (ibid., 1906, p. 481).

[4] *The Walsingham Packet* (1799), 2 C. Rob. 77. See also *The Maria* (1799), 1 C. Rob. 340.

[5] [1916] 2 A.C. 77, 93. See also *The Bathori* (1933), 47 Lloyd's List Reports, 123; *The Walsingham Packet*, *supra*. The judgment of Lord Stowell in *The Recovery* (1807), 6 C. Rob. 341, often cited as evidence to the contrary, would seem to be explained by the fact that the Navigation Acts did not fall to be applied to a prize court. For cases decided by the instance jurisdiction of the Court of Admiralty see *The Annapolis* (1861), Lush. 295; *The Amalia* (1863), 1 Moore P.C. (N.S.) 471; *The Zollverein*, 2 Jur. (N.S.) 429.

[6] See also *The Alwaki*, [1940] P. 215.

> 'The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution.'[1]

In countries where the executive is able to issue ordinances with legislative effect such a restriction on municipal interference with the law applied by prize courts is therefore not accepted. In *The Elida*[2] the Supreme Prize Court at Berlin held that it was bound by national prize regulations, that it could take principles of international law into account only when the prize regulations were silent, and that, in any case, it could not review the legality of the prize regulations in the light of international law. Germany was, at the time when that decision was handed down, firmly wedded to dualist doctrine. But the same principles are applied in France, where the *ordonnance de la marine* issued by Louis XIV in 1681 still forms the basis of prize law.[3] In the United States, too, courts are apparently prepared to apply executive orders,[4] although there is no express authority to that effect.[5]

(*c*) *Act of state*

An 'act of state' has been defined by reference to English law as 'an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are within the allegiance of the Crown'.[6] Municipal courts accept such acts of state and will not review their legality in the light of international or municipal law. The effect of this judicial self-limitation on the supremacy of international law varies with the different forms of act of state.

In the first place, the act of state may be a tortious act committed by a public servant in the course of his duties. In English law the plea of act of state is a sufficient defence to an action against an official for an act committed—probably abroad[7]—against an alien resident abroad.[8] It was laid down in the case of *Buron* v. *Denman*[1] that in such a case the Crown is alone responsible for the act and that, owing to the special position of the Crown, the wrong ceases to be actionable. This position has not been changed by the Crown Proceedings Act, 1947. Although Section 2 (1) (*a*) makes the Crown liable 'in respect of torts committed by its servants and agents', a special proviso was inserted:

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[1] At p. 90.

[2] *American Journal of International Law*, 10 (1916), p. 916. See also, for a similar nineteenth-century Spanish view, *Parliamentary Papers*, 1867, vol. lxxv, p. 102 (Cmd. 3772), Enclosure in No. 47, p. 48.

[3] See the cases reported in *Prises Maritimes, Jurisprudence Française de la Guerre 1939–45* (1947).

[4] Wright, in *American Journal of International Law*, 11 (1917), p. 16.

[5] The case of *Maissonaire* v. *Keating*, 2 Gall. 325, is often erroneously cited in this connexion. The question at issue in that case was whether captors would be exonerated in the courts [of the other state concerned] by the existence of an executive order justifying their action.

[6] Wade and Phillips, *Constitutional Law* (3rd ed., 1946), p. 176.

[7] See *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262, and *Commercial and Estates Co. of Egypt* v. *Board of Trade*, [1925] 1 K.B. 271. Against an enemy alien the defence of 'act of state' is valid even in respect of acts done within the United Kingdom: *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1947] K.B. 41; *Netz* v. *Ede*, [1946] 1 A.E.R. 628, at p. 632.

[8] The defence is not valid against a British subject (*Entick* v. *Carrington*, 1765, 19 St. Tr. 1030) or an alien resident in England (*Johnstone* v. *Pedlar*, *supra*, n. 7).

> 'Provided that no proceedings shall lie against the Crown by virtue of par. (*a*) of this sub-section in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or agent or his estate.'

That proviso, it has been suggested, was inserted to make it plain that the Crown was to participate in the defence of 'act of State' which is open to the servant under the rule in *Buron* v. *Denman*.[2] That rule clearly limits the operation of international law in the municipal sphere, and excludes the action of the judiciary in a matter properly within the scope of its authority.

Outside the United Kingdom the rule has received only hesitating support.[3] In the United States a long line of cases in the nineteenth century affirmed that tortious acts committed by public officers in relation to aliens abroad, even with the authority of the United States, are actionable.[4] In *The Paquete Habana*,[5] decided in 1903, the Supreme Court, apparently breaking with tradition, held that

> 'We are not aware that it is disputed that when the act of a public officer is authorised or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued. . . .'

But the peculiar circumstances of the case should be noted. The *Paquete Habana* had been seized in prize. By an earlier decision of the Prize Court the vessel was released on the ground that the seizure was illegal, and damages were awarded to her owners. The question before the Court was whether the captors or the United States should pay the damages. The Court held that, in view of the adoption of the acts of capture by the United States the latter, and not the captors, was liable. The theory of ratification was thus invoked in order to subject the Government to liability.[1] In *O'Reilly de Camara* v. *Brooke*,[2] decided in 1908, the same principle was applied to circumstances more closely akin to those in *Buron* v. *Denman*. In an action brought by an alien concerning the expropriation by a United States official of her property in Cuba during the United States occupation, the Supreme Court held:

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[1] (1848) 2 Ex. 167.

[2] Glanville L. Williams, *Crown Proceedings* (1948), p. 44. The learned author points out that in this connexion the proviso may have been unnecessary because 'where the servant has the defence of act of state it cannot be said that he has committed a tort within the words of section 2 (1) (*a*), and thus there is nothing for which the Crown could in any event be liable'.

[3] See, e.g., *Rothschild & Sons* v. *Egyptian Government* (*Annual Digest*, 1925–6, Case No. 14), in which the Egyptian Government contended that the breach of a contract with an alien resident abroad was an act of state. That contention was rejected by the Mixed Courts of first instance and of appeal. No general rule can be deduced from the case as Egypt was at the time subjected to the Capitulations which prohibited the Government from derogating from the rights of foreign subjects. The Mixed Courts were competent to review legislation and executive acts in the light of that obligation.

[4] See, e.g., *Little* v. *Bareme*, 2 Cranch 70; *The Charming Betsey*, 2 Cranch 64; *Mally* v. *Shattuck*, 3 Cranch 458; *Belknap* v. *Schild*, 161 U.S. 100.

[5] 189 U.S. 753.

> 'It is said that neither the Executive nor Congress could have taken the plaintiff's property, and that therefore they could not ratify the act of General Brooke so as to make his act that of the United States and to exonerate him. But it has been held that a tort could be ratified so far as to make an act done in the course of the principal's business and purporting to be done in his name, his tort . . . and it may be assumed that this is the law as to the wrongful appropriation of property which the principal retains. . . .'

It added, perhaps unnecessarily, that it was impossible for the Court to declare an act adopted by the Executive Congress and the treaty-making power a tort in violation of the law of nations. However emphatic these statements may be, they must be regarded as *obiter*; for the Court found that the property right which was said to be infringed had no longer existed at the time of the alleged infringement. Finally, in *Chüoco Tiaco* v. *Forbes*,[3] decided in 1913, where the principle of ratification was again affirmed, the act in question was one which could lawfully be done by the United States, although the official executing it had lacked authority to do so. The case is thus not relevant to the question here discussed. In general it would appear that at no time did courts in the United States commit themselves fully to the acceptance of the doctrine in *Buron* v. *Denman*.

Secondly, acts done in connexion with the annexation of foreign territory are in some countries regarded as acts of state and cannot be reviewed by the courts. In England it was held in the case of *Secretary of State for India* v. *Kamachee Boye Sahaba*[4] that an act of annexation cannot be questioned in a municipal court. Like other acts of international policy, which will be dealt with below, it is indeed hardly a matter for intra-territorial decision. In *Sobhuza II* v. *Miller*[5] it was held that an Order in Council acquiring for the Crown unallotted lands within an annexed territory to the detriment of the local inhabitants is an act of state and, as such, unchallengeable. The decision, in that case, was based partly on the powers given to the Crown under the Foreign Jurisdiction Act. Similarly, the case of *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*,[6] in which the Court denied the right of the inhabitants of a ceded territory to rely on the terms of the cession, can be explained, in part, by reference to the fact that a treaty, whether of cession or otherwise, cannot be enforced

[1] See also *Wiggins* v. *U.S.*, 3 Ct. Cl. 412.

[2] 209 U.S. 45.

[3] 228 U.S. 549.

[4] 13 Moo. P.C. 22, 86.

[5] [1926] A.C. 518.

[6] [1941] A.C. 308.

in the courts until it has been legislated upon. But the decision in *Cook* v. *Sprigg*,[1] in which it was held, in sweeping terms, that persons holding concessions from the ceding sovereign could not rely on rules of customary international law regarding state succession—despite the fact that English courts usually regard customary international law as part of the law of the land—shows that the doctrine of act of state in this connexion independently materially limits the supremacy of international law in the municipal sphere. It has been suggested[2] that the authority of that case is weakened by the decision in *Sprigg* v. *Sigcau*.[3] In that case a proclamation was not enforced because it was held to be an invasion of the rights and liberties of a British subject. It is now claimed that the same principle should have been applied to the proprietary rights of British subjects in *Cook* v. *Sprigg*. It is certainly true that *Sprigg* v. *Sigcau* limits the decision in *Cook* v. *Sprigg* in that it shows that the Crown, by the mere fact of cession or annexation, is not empowered to treat its new subjects arbitrarily. But the rights in the latter case were contractual and, as such, to a certain extent personally connected with the ruler who granted them. The doctrine of 'act of state' in this connexion would appear to mean that the acts of the Crown in the taking over of the rights and liabilities of the former ruler are unchallengeable.[4] The same doctrine obtains in France. There, claims against the executive can be brought only in the Conseil d'État. The jurisdiction of that Court is expressly limited to administrative matters and excludes *actes de gouvernement*. Claims relating to state succession have uniformly been held to refer to *actes de gouvernement* and thus not to be justiciable. Thus in the case of *Ravero*,[5] decided on 5 August 1904, the Conseil d'État held, with regard to a claim arising out of the debts of the former Government of Madagascar:

> 'Cette demande se rattache à l'exercice des droits de souveraineté résultant pour la France de la prise de possession de l'île de Madagascar et de ses dépendances . . .; ce

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[1] [1899] A.C. 572.

[2] Wade in this *Year Book*, 15 (1934), pp. 98–112. Professor Wade also cites the case of *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399, 404, in which it was held that a change of sovereignty is not to be presumed to disturb rights of private owners and that the general terms of a cession are prima facie to be construed accordingly. But in that case the question at issue was not the validity of acts done in connexion with the cession, but the interpretation of the terms of the cession by reference to the policy of the Government. Similarly, in *Eshugbayo Eleko* v. *Government of Nigeria*, [1931] A.C. 672, the question at issue was the interpretation of native customs prior to the cession which the Crown, in an Order in Council, had expressly confirmed.

[3] [1897] A.C. 238.

[4] See also *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B. 391. And see, for cases relating to leases or similar rights to land held from the former ruler, *Secretary of State for India* v. *Sardar Rustam Khan* (*Annual Digest*, 1941–2, Case No. 21); *Vayjesingji Joravarsingji* v. *Secretary of State for India* (1924), 31 I.A. 357.

[5] Cited by Sack in *Hague Recueil*, 23 (1928), p. 318. See also *Dalloz Périodique*, 1862, Part iii, p. 31. And see a decision of the Italian Court of Cassation of 12 June 1885 (*Clunet*, 13 (1886), p. 747).

n'est pas au Conseil d'État qu'il appartient d'apprécier si, par suite de cette prise de possession, l'État français est tenu des dettes de l'État malgache.'

In the United States, on the other hand, the rules of state succession are fully applicable in the courts. It is there held that, although the validity of an act of state itself cannot be reviewed, the consequences of such an act are open to review.[1]

Thirdly, major acts of policy in international relations are acts of state. Thus both the declaration and the termination of war are matters exclusively for the determination of the executive or, as in the United States, the legislature.[2] The question has been raised whether, in view of the fact that aggressive war has been made illegal in international law,[3] individuals should not be able to bring proceedings with a view to setting aside illegal mobilization orders.[4] It does not appear likely that individuals will be able to take such steps. That does not mean that to that extent the supremacy of international law is denied. The decision whether a war is one of aggression involves the appreciation of so many factors that it is doubtful whether the cause of justice is likely to be served by empowering a municipal court to make so weighty a decision.[5] Similarly, it has often been held that the denunciation of treaties must be accepted by the courts,[6] as must the decision of the executive that the other contracting party is, or is not, capable of performing its obligations.[7] Also, the decision whether a state, government, or group of insurgents fulfils the conditions required for recognition, is exclusively left to the executive.[8] In the words of the United States Supreme Court:[9]

'The conduct of the foreign relations of the government of the United States is committed by the Constitution to the executive and legislative departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial enquiry or decision.'

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[1] See, e.g., *United States* v. *Percheman* (1833), 7 Peters 51, 86.

[2] See, e.g., *United States* v. 129 *Packages* (1862), 27 Fed. Cas. 284, 288; and the Egyptian case of *Finck* v. *Minister of the Interior* (this *Year Book*, 6 (1925), pp. 219–26).

[3] And by some national constitutions, e.g. the preamble of the French constitution of 27 October 1946, and Art. 11 of the Italian constitution of 27 December 1947.

[4] See Scelle, *Précis de Droit des Gens*, vol. ii (1934), pp. 44–47; Wehberg in *Hague Recueil*, 7 (1925), pp. 35 ff.

[5] The short-lived Spanish constitution of 1931 laid down some clear tests; it provided that the President of the Republic might declare war only on the conditions prescribed by the League of Nations, after the measures of pacific settlement of disputes had been exhausted. The Penal Code moreover prescribed a penalty for the wrongful declaration of war. It is nevertheless doubtful whether individuals would have been able to challenge such a declaration in a court of law.

[6] See, e.g., the Swiss decisions of *In re Lepeschkin* (*Annual Digest*, 1923–4, Case No. 189) and *Helvetia* v. *Kuch and Frauenberger Kuch* (*Annual Digest*, 1946). See also the American decisions of *Clark* v. *Allen*, 331 U.S. 503; *Jones* v. *Walker*, 2 Paine 688; *Ware* v. *Hylton*, 3 Dall. 199; *Charlton* v. *Kelly*, 229 U.S. 447, 469. For a Dutch decision see *Annual Digest*, 1919–42 (Supplementary Volume), Case No. 124.

[7] *University* v. *Miller* (1831), 14 N.C. 188, 193; *Terlinden* v. *Ames* (1902), 184 U.S. 270.

[8] See, e.g., *Luther* v. *Sagor*, [1921] 1 K.B. 456; and, for a Norwegian decision, *Annual Digest*, 1938–40, Case No. 27.

[9] *Oetjen* v. *Central Leather Co.*, 246 U.S. 297.

In all these cases the object is not to empower the executive to violate international law with an effect binding within the state—although that may be the result in individual cases—but to leave the appreciation of the factors involved to the organ most qualified to do so. Moreover, although private persons are affected by a breach of an international obligation on the part of their government in this connexion, it is primarily of interest to the states concerned, and, as such, within the jurisdiction of an international rather than a national court.

Closely related to this category of acts of state are cases in which the courts accept as binding the view of the executive as to the existence of certain legal situations in the international sphere. The extent to which they do so varies in different countries.[1] Thus in many countries courts, when faced with a plea of immunity, whether on behalf of sovereigns, diplomatic envoys, or public vessels, seek information on the matter from the executive.[2] The same is true with regard to the question whether certain territory is recognized to be within the boundaries of a state,[3] with regard to the general status of foreign territory,[4] or of a foreign state.[5] But it is controversial, first, whether the statements of the executive as to the facts must be treated as evidence only—although well-informed evidence—or whether they must be treated as exhaustive and conclusive.[6] Many continental courts would appear to incline to the former view,[7] Anglo-American practice is firmly wedded to the latter.[8] In either case there is hardly a question of a serious encroachment on the functions of the judiciary. But the question has arisen, secondly, whether the statement of the executive in such a case is binding on questions of law as well as of fact. That has been the view of United States courts in recent years.[9] It is a view which lends itself to some abuse, but even so it has been suggested with some justice that 'so long as the Executive . . . acts by reference not to shifting motives of policy, but to considerations of legal principle. . . there is no reason to view the existing practice with undue apprehension'.[1]

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[1] This topic has been discussed by Lyons in this *Year Book*, 23 (1946); 24 (1947); 25 (1948).

[2] *Engelke* v. *Musmann*, [1928] A.C. 433. For Austrian cases see *Annual Digest*, 1919–22, Case No. 208; 1931–2, Case No. 182, for a French case, ibid., 1927–8, Case No. 247; a Greek case, ibid., 1929–30, Case No. 215; a Dutch case, ibid., 1933–4, Case No. 165; a Czechoslovak case, ibid., 1927–8, Case No. 251; a Norwegian case, ibid., 1925–6, Case No. 45.

[3] See, e.g., *The Fagernes*, [1927] p. 311; *Foster* v. *Globe Venture Syndicate*, [1900] 1 Ch. 811; the German case of *The Elida*, *American Journal of International Law*, 10 (1916), p. 916; *Jones* v. *United States*, 127 U.S. 202, 221; *Foster* v. *Neilson*, 2 Pet. 253; *United States* v. *La Ninfa*, 49 Fed. 575.

[4] *Sovfracht* case, [1943] A.C. 203, 229; *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415, 420; *Annual Digest*, 1925–6, Case No. 82 (a Czechoslovak case).

[5] *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797.

[6] See Mann in *Transactions of the Grotius Society*, 29 (1944), p. 149.

[7] See, e.g., Strupp in *Zeitschrift für Völkerrecht*, 13 (1924–6), Suppl. p. 26; *Annual Digest*, 1925–6, Case No. 244.

[8] See, e.g., *The Arantzazu Mendi*, [1939] A.C. 256, 264.

[9] *The Ucayali* (1943), 318 U.S. 578; *Republic of Mexico* v. *Hoffmann* (1945), 324 U.S. 30. See also a Czechoslovak case in *Annual Digest*, 1927–8, Case No. 251.

Finally, the doctrine of act of state has been brought into play in some countries in connexion with the interpretation of treaties. In England the question does not arise directly, as treaties, to become applicable in the courts, must be incorporated in national legislation. But it has been held that an English court is both bound and entitled to construe a statute giving effect to a treaty.[2] In the United States a treaty, as part of the law of the land, can be interpreted by the courts, but great weight will be given to the views of the executive.[3] Moreover, the interpretation placed upon a treaty by the executive in so far as the treaty relates to international relations is binding.[4] In France the Conseil d'État has consistently refused to interpret treaties on the ground that they are *actes de gouvernement*,[5] and has similarly refused to review the legality of acts taken in pursuance of a treaty.[6] Other French courts interpret treaties in so far as they refer to private interests, but will not interpret treaties raising questions of *ordre public international*.[7] A general interpretative declaration by the executive is, moreover, binding upon the courts.[8] Egyptian courts have followed these principles to a certain extent.[9] Italian courts, also, have apparently drawn a distinction between public and private interests, and have held that treaties, in so far as they relate to the former, cannot be interpreted by municipal courts.[1] It does not appear that, within these limits, the doctrine of act of state seriously hampers the functions of municipal courts in the enforcement of treaty-law, particularly as there has been a tendency to interpret the concept of 'private interests' extensively. The power of interpretation left to the executive where public interests are in question can, again, be justified by reference to the necessary specialization of governmental functions.[2]

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[1] Lyons in this *Year Book*, 24 (1947), at p. 147.

[2] *Stoeck* v. *Public Trustee*, [1921] 2 Ch. 68, 71. See, generally, on the interpretation of treaties by English courts, Jenks in this *Year Book*, 20 (1939), pp. 20–23.

[3] *Sullivan* v. *Kidd* (1921), 254 U.S. 433, 442.

[4] *Pearcy* v. *Stranahan* (1907), 205 U.S. 257; *U.S.S.R.* v. *National City Bank of New York* (1941), *Annual Digest*, 1941–2, Case No. 14.

[5] For references see Masters, op. cit., p. 172; Sack in *Hague Recueil*, 23 (1928), pp. 317–18. And see *Annual Digest*, 1919–42 (Supplementary Volume), Cases No. 125, 28, and 46; ibid., 1929–30, Case No. 233; ibid., 1935–7, Case No. 216; *Sirey*, 1950, Part iii, p. 89.

[6] For references see Mestre in *Hague Recueil*, 38 (1931), pp. 271 ff. The author points out that there has recently been a tendency to restrict the effects of that limitation. See also *Annual Digest*, 1933–4, Case No. 214.

[7] For references see Masters, op. cit., pp. 170–2; Maury in *Hague Recueil*, 57 (1936), pp. 443 ff.; Mestre, loc. cit., pp. 290 ff. For recent cases in which the court interpreted treaties on the ground that private interests only were at stake see *Sirey*, 1946, Part ii, pp. 37–41; *Annual Digest*, 1919–42 (Supplementary Volume), Case No. 226 (with note); ibid., 1931–2, Case No. 204 (with note); ibid., 1929–30, note to Case 233. For cases in which the courts refused to interpret treaties see *Annual Digest*, 1919–42 (Supplementary Volume), Cases No. 34 and 128; ibid., 1923–4, Cases No. 190 and 191; ibid., 1927–8, Case No. 266; *Sirey*, 1950, Part i, p. 166.

[8] See, e.g., *Landelle* v. *Cavaillero* (*Sirey*, 1930, Part ii, p. 161): 'Ladite interprétation fait corps avec le texte de la convention consulaire précitée et l'impose à l'autorité judiciaire.' See also *Burnup* v. *Dolphens* (*Clunet*, 57 (1930), p. 1209) and *Annual Digest*, 1927–8, Case No. 266; and, for a case to the same effect decided by the Conseil d'État, *Clunet*, 50 (1923), p. 223. But see some *obiter* remarks in *Lepers* v. *Delattre* (*Clunet*, 58 (1931), p. 376). These decisions refer to unilateral interpretation of a treaty by the French administration. Courts have been unanimous that an interpretation arrived at by an exchange of letters between the parties concerned is binding on them. See, e.g., *Lepers* v. *Delattre*, *supra*. And see *Becker* v. *Préfet de la Moselle* (*Revue critique de droit international privé*, 38 (1949), p. 57). See also cases cited by Preuss in *American Journal of International Law*, 44 (1950), at pp. 662–3.

[9] See *Annual Digest*, 1933–4, Case No. 184; ibid., 1938–40, Cases No. 186 and 191.

(*d*) *Binding judicial precedent*[3]

Finally, reference must be made to the limitation, peculiar to common-law countries, on the enforcement of international law in municipal courts. In courts subject to the doctrine of binding judicial precedent the international character of international law is sometimes neglected, and the courts are not sufficiently sensitive to changes in the customary law of nations. Courts have, indeed, recognized that their power to apply international law is in that manner limited. Thus in the case of *Chung Chi Cheung* v. *The King*[4] Lord Atkin stated, in a frequently quoted passage:

> 'The Courts . . . will treat [international law] as incorporated into the domestic law so far as it is not inconsistent with rules enacted by statutes or *finally declared by their tribunals*.'

English courts have, in recent cases, increasingly been in the position to rely on earlier decisions on the same subject. Of these cases only two categories are of interest in this connexion. In the first instance, there are cases in which the general principle of international law which has received the imprimatur of judicial authority and is thus binding on the court remains valid, but where the circumstances have raised new legal issues which might serve to distinguish the new case from earlier authorities. Thus it has been pointed out[5] that in the case of *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*[6] the Court, instead of simply relying on previous decisions laying down the principle of the validity of the internal acts of an authority recognized *de facto*, might have considered the relevance of the fact that the occupation of Abyssinia was effected in violation of the Covenant of the League of Nations. In cases of this nature it is not the principle of binding judicial precedent which is responsible for the inadequate application of international law, for municipal courts have found no difficulty, in the enforcement of their own law, in limiting existing principles by stressing novel features in cases apparently within the scope of an old-established rule. The difficulty here is rather that municipal courts are not always sufficiently acquainted with the subtleties of international law.

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[1] See a decision of the Court of Cassation of 12 June 1885 (*Clunet*, 13 (1886), p. 746).

[2] See, on this, Basdevant in *Revue critique de droit international privé*, 38 (1949), pp. 413 ff.

[3] See Jenks in this *Year Book*, 20 (1939), pp. 28–32, for a discussion of this problem. The learned author there points out that 'uniformity, consistency, and certainty', which are the aim of a doctrine of binding precedent, can be bought too dearly 'at the price of the persistence of a cleavage between national interpretation and international law as interpreted by the International Court'.

[4] [1939] A.C. at p. 168. See also *In the Matter of a Reference as to the Powers of the City of Ottawa . . . to Levy Rates on Foreign Legations . . .* (*Annual Digest*, 1941–2, Case No. 106, at p. 339); and *Reference re the Exemption of United States Forces from Canadian Criminal Law* (ibid., 1943–5, Case No. 36, at p. 132).

[5] See Lauterpacht in *Transactions of the Grotius Society*, 25 (1939), p. 87, note m.

[6] [1937] Ch. 513.

Secondly, there are cases in which it is doubtful whether the rule established by earlier judicial authority ever represented or, if so, continues to represent, a valid rule of international law. Thus one of the issues raised by the recent case of *Krajina* v. *The Tass Agency*[1] was whether the principle of state immunity can be invoked on behalf of an organization whose activities are other than governmental. The present trend of international opinion would seem to be that it cannot. But Tucker L.J. pointed out that, because of the decision of the Court of Appeal in *The Porto Alexandre*,[2] plaintiff was precluded from raising that question in the Court of Appeal. The decision of the Judicial Committee of the Privy Council in *The Kronprinsessan Margareta*[3] is also significant:

> 'Their Lordships are fully aware that some Continental jurists have criticised the rule of infection adversely, and that Continental Prize Courts have not always accepted it, though it has long been adopted in the United States and more recently in Japan. They are, however, bound by the decisions of their predecessors, which, consistent as they are, it is too late to overrule and impracticable to distinguish.'[4]

Not all courts have adopted so rigid an attitude. Thus in *The Odessa*[5] Sir Samuel Evans said:

> 'In the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be a general acceptance of such by civilised nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted.'

In *The Berlin*[6] he held that, although English authorities did not support the rule of the immunity from capture of fishing vessels, 'after the lapse of a century I am of opinion that it has become a sufficiently settled doctrine and practice of the law of nations. . . .' As prize cases these decisions were, perhaps, in a category of their own. However, a similar view was expressed by one of the judges of the Supreme Court of Canada:

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[1] [1949] 2 A.E.R. 274.

[2] [1920] P. 30. It is now an established rule that the Court of Appeal is bound by its own decisions.

[3] [1921] 1 A.C. 486, at p. 495.

[4] See also *Price* v. *Griffin, The Times* newspaper, 20 February 1948, in which Mr. Justice Birkett held that he was bound by a—somewhat controversial—decision of the House of Lords to the effect that the Foreign Office Certificate testifying to the diplomatic immunity of the defendant deprived the Court of jurisdiction (*Musmann* v. *Engelke*, [1928] A.C. 433).

[5] 1 B. & C.P.C., at p. 174.

[6] [1914] P. 265, at p. 272.

> 'To insist upon precise precedent in usage would sterilize judicial action toward changing international relations. . . .'[1]

However, the doctrine of binding judicial precedent carries with it the danger that municipal courts will get out of touch with international law as practised at the actual time.

IV. *Principles and rules facilitating the application and enforcement of international law in the municipal sphere*

(*a*) *Rules of construction*

It is clear that, in the present state of the relationship between international law and municipal law, serious limitations on the operation of international law exist in the municipal sphere. At the same time states have not been unaware of their obligations in the international sphere, and there have therefore been attempts to mitigate the effect of these limitations, in particular of the fact that municipal law is enforced by the courts even when it conflicts with international law. There exist, as yet, no international agreements depriving the signatories of the power to enact legislation contrary to international law, although there have been some projects for such a treaty.[2] Such a treaty, indeed, would not itself solve the problem; in addition, it would be necessary that national courts should be empowered to declare legislation in violation of such a treaty void.[3] The essential problem at the present stage thus relates to municipal machinery. Within many states measures have been taken to minimize or even to end the power of the legislature to enact legislation in defiance of international law. Two organs, in particular, have been in a position to take such measures: the courts, in the exercise of their power of interpreting laws and of choosing the law applicable to a case; and a constitutive assembly, drawing up a constitution which has a standing superior to ordinary legislative enactments.

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[1] *Reference re the Exemption of United States Forces from Canadian Criminal Law, Annual Digest*, 1943–5, Case No. 36, *per* Rand J. The learned Judge went on to point out that rules running counter to usages of fundamental constitutional importance could not be enforced, and therefore rejected a claim to absolute immunity of foreign forces in Canada.

[2] See, e.g., Project No. 1 drawn up by the International Commission of American Jurists in 1927, Art. 3; Project No. 4 drawn up by the American Institute of International Law in 1925, Art. 4.

[3] Of some interest, in this connexion, is Art. 67 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, which provides as follows: 'The Courts [of the Occupant] shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular that the penalty shall be proportionate to the offence. . . .' The Occupant's own courts are thus by treaty bound not to apply his laws if they violate certain principles. The question remains how far, under municipal law, they can give effect to such a treaty.

Courts in many countries have made it a rule of construction that laws must be interpreted so as not to conflict with international law unless the intention of the legislature to the contrary is so clear that it is beyond all doubt. In England that rule of construction has been followed consistently both in ordinary courts[1] and in courts of admiralty and prize.[2] The practice of the courts of Commonwealth countries has been similar.[3] Only rarely have these courts admitted that a statute was intended to violate international law.[4] One case only is known to the writer in which a court refused to apply that principle of construction. In *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada*[5] the Judicial Committee of the Privy Council held:

> 'It may be true that in construing legislation some weight ought, in an appropriate case, to be given to a consideration of the accepted principles of international law, but the nature of the legislation in any particular case has to be considered in determining to what extent, if at all, it is right on a question of construction to advert to those principles. In their Lordships' view those principles find no place in the construction of the War Measures Act. The Act is directed to the exercise by the Governor in Council of powers vested in the Parliament of the Dominion at a time when war, invasion or insurrection or their apprehension exists. The accepted rules of international law applicable in time of peace can hardly be in contemplation, and the inference cannot be drawn that the Parliament of the Dominion impliedly imposed the limitation suggested.'

It is clear from the context that the situation in that case was exceptional, and it cannot be considered that the decision casts serious doubt on the rule of interpretation in accordance with international law as a general principle of construction. In the United States, also, courts have applied that principle.[6] Swiss courts have given it emphatic support.[7] French courts, also, have been concerned to interpret legislative enactments in accordance with international law, by reference to the more general principle that, in interpreting a new law, one must always take into consideration the existing laws and general legal principles which remain in force unless the new law restricts or modifies them in precise terms.[1] The same is true of the practice of German[2] and of Belgian[3] courts.

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[1] See, e.g., *R.* v. *Dudley* (1884), 14 Q.B.D. 273, 284; *R.* v. *Keyn* (1876), 2 Ex. D. 63, 85; *Leroux* v. *Brown* L.J. 22 C.P. 1, 3.

[2] *The Le Louis* (1817), 2 Dods. 210, 239, 251, 254; *The Annapolis* (1861), Lush. 295; *The Amedie* (1810), 1 Acton 240, 250; *Lopez* v. *Burslem* (1843), 4 Moo. P.C. 300, 305.

[3] See the Australian case of *Ex parte Koutalianos*, *Annual Digest*, 1943–5, Case No. 62; the Indian case of *Mohammad Mohy-ud-Din* v. *The King Emperor* (1946), 8 F.C.R. 94; the Canadian case of *Croft* v. *Dunphy*, [1933] 1 D.L.R. 225, [1933] A.C. 156. It was suggested in the Court of Appeal in the *Arrow River* case (*supra*, p. 53) that legislation should be so construed as not to conflict even with a treaty which had not been legislated upon ([1931] 2 D.L.R. 216, 217).

[4] See, e.g., *Polites* v. *The Commonwealth*, *Annual Digest*, 1943–5, Case No. 61.

[5] [1947] A.C. 87, 104. It might be argued that the Court considered the principle of construction but came to the conclusion that the intention of the legislature to exclude international law was clear.

[6] See, e.g., *The Charming Betsey* (1804), 2 Cranch at p. 118; and *Annual Digest*, 1931–2, Case No. 229.

[7] See, e.g., *B.G.E.* (1930), 56, i, p. 237.

This rule of construction has been applied in cases in which the new enactment, unless restrictively interpreted, by its general tenor violates rules of international law. In a slightly different case the legislative enactment, unobjectionable from the point of view of general principles, may violate the provisions of specific treaties relating to the same subject. In this connexion, also, courts have attempted to reconcile the conflicting legal provisions, and thus to prevent a violation of international law. They have assumed that the legislature, unless expressly stating the contrary, intended to maintain existing treaty relations and to exempt persons able to rely on treaty provisions from general provisions of the new enactment. In England it was held in *Ex parte Bouvier*[4] that the Extradition Act of 1870 'intended . . . to save the existing treaties in their full integrity and force'. Similarly, in the United States, courts have not favoured the 'repeal by implication' of treaties.[5] The Swiss Bundesgericht held, in the case of *Stübler*,[6] that the federal extradition law of 1892 did not intend to overrule conflicting provisions of existing treaties. Moreover, French courts have produced an impressive jurisprudence on the subject. In particular, in the enforcement of special legislation on leases from the benefit of which aliens were expressly excluded, they have repeatedly held that aliens able to rely on treaty provisions stipulating 'national treatment' for the subjects of the signatories can claim the benefit of that legislation.[7] Belgian courts have handed down similar judgments.[8] Dutch courts, also, have so interpreted national legislation as not to suggest that pre-existing treaty rights were brushed aside.[9] German courts have given their support to such a rule of interpretation.[1] An Italian Court of Appeal held emphatically that 'it cannot be admitted that the legislature intended to curtail the efficacy of the provisions contained in the Treaties of Peace. . . .'[2]

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[1] See, e.g., *Geoffroy and Delore* v. *Insurance Co. 'Bulgaria'*, *Sirey*, 1920, Part ii, p. 17; *Gouvernement espagnol* v. *Lambège et Préjol*, *Sirey*, 1849, Part i, p. 81.

[2] See, e.g., *R.G.Str.*, 62 (1928), p. 369.

[3] See Masters, op. cit., pp. 221–3. And see, in particular, *Clunet*, 32 (1905), pp. 416, 420; ibid., 33 (1906), p. 481.

[4] (1872), 27 L.T.R. 844. See also, on that case, *B.F.S.P.*, 67, pp. 809, 820–9.

[5] *Chew Heong* v. *U.S.*, 112 U.S. 536, 540; *Whitney* v. *Robertson*, 124 U.S. 190; *U.S.* v. *Lee Yen Tai*, 185 U.S. 513; *Annual Digest*, 1933–4, Case No. 199; ibid., 1938–40, Cases No. 196 and 197.

[6] *B.G.E.* 18, pp. 189, 193. See also *B.G.E.* 10, pp. 583, 585, in which the Postal Convention of 1868, not the federal law of 1876, was held to be applicable to the foreign parcel-post service.

[7] See *Clunet*, 57 (1930), p. 127; ibid., 55 (1928), p. 982; ibid., p. 998; *Dalloz hebd.*, 1928, p. 569; ibid., 1930, p. 6; ibid., 1933, p. 118; *Sirey*, 1936, Part i, p. 257; *Annual Digest*, 1935–7, Case No. 152; and the cases cited below in connexion with the law of 28 May 1943. The practice has not, however, been universal: in some cases the courts, while attempting to reconcile treaty and law, have restricted the provisions of the treaty rather than of the law. See Masters, op. cit., pp. 156–63; *Sirey*, 1932, Part i, pp. 249 and 259; *Dalloz*, 1947, p. 201.

[8] See, e.g., *Annual Digest*, 1927–8, Cases No. 6 and 312.

[9] See, e.g., ibid., 1935–7, Case No. 5.

The task of the courts, in this connexion, is one of interpretation. But in some cases courts have gone farther and have, either by establishing an irrebuttable presumption that the legislature intended to act in conformity with international law, or without troubling to refer to the implied intention of the legislature, exercised a choice between the applicable legal provisions in favour of the rule of international law. They have done so, moreover, by express reference to the superior standing of international law in relation to municipal law. This has been true, in particular, of the practice of Swiss courts. Thus in the case of *Martin* v. *Renold*[3] the Bundesgericht held that a treaty is, as a matter of principle, not subject to modification by a later law, as it is binding on Switzerland in relation to other states. In France, the Court of Appeal of Orleans, in refusing to apply a French law of 1922 to a case governed by the Franco-Swiss Convention of 1869, held that 'these legislative dispositions of an internal order . . . cannot modify rules fixed by common consent between several states by a diplomatic convention intended to govern international relations'.[4]

Many Latin-American courts have held that a treaty overrides all legislative provisions in conflict with it, even if these are enacted at a later date.[5] The German *Staatsgerichtshof* gave expression to the view that a treaty is, as such, not subject to modification by a later statute.[6] Similar views have been expressed by the courts of Italy,[7] Yugoslavia,[8] Danzig,[9] Syria,[10] and Tangier.[11] This trend of judicial opinion is significant. It shows that courts have realized that international law, by its very nature, must be enforced contrary provisions of municipal law notwithstanding.

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[1] See, e.g., *R.G.Z.* 26, p. 117; *R.G.Z.* 24, pp. 12, 13; *R.G.Z.* 71, pp. 293, 295–6; *R.G.Str.* 66 (1932), p. 87.

[2] *Annual Digest*, 1941–2, Case No. 76.

[3] *B.G.E.* 35 (1909), i, p. 594, at p. 596. See also *B.G.E.* 20, p. 342; *B.G.E.* 21, p. 76, at p. 79; *B.G.E.* 21, p. 705; *B.G.E.* 22, p. 1025.

[4] *Annual Digest*, 1935–7, Case No. 200. See, to the same effect, ibid., 1943–5, Case No. 87, and cases cited by Preuss in *American Journal of International Law*, 44 (1950), at pp. 659–60. See also *Dalloz hebd.*, 1939, p. 61, for a decision affirming, in a case where the treaty was posterior to the law, that international conventions are superior to the provisions of the municipal law of signatory states. And see a decision of an Italian court, in similar circumstances, for a similar affirmation of the supremacy of international law (*Foro Italiano*, 69 (1944–6), i, p. 423).

[5] See, e.g., a decision of the Supreme Court of Guatemala of 31 March 1937 (*Clunet*, 66 (1939), p. 412); a decision of the Supreme Court of Colombia of 11 May 1944 (*Annual Digest*, 1943–5, Case No. 73); a decision of an appellate court of Uruguay of 1 November 1943 (ibid., p. 239); and a decision of the Supreme Court of Panama (*Annual Digest*, 1931–2, Case No. 5).

[6] *R.G.Z.* 115, Suppl., at p. 6. See also an early decision of the *Reichsgericht* (*R.G.Z.* 26 (1890), p. 117).

[7] *Feltri* v. *Francia, Ann. di Dir. comp.* ii–iii (1929), p. 560.

[8] *Annual Digest*, 1927–8, Case No. 309.

[9] Ibid., 1933–4, Case No. 186.

[10] Ibid., 1931–2, Case No. 151.

[11] Ibid., 1938–40, Case No. 23. The Court based its opinion largely on the peculiar nature of the constitution of Tangier, but also referred to general principles.

(*b*) *Constitutional provisions*

At the same time, few municipal courts have the power to set aside or to refuse to enforce legislation clearly and deliberately intended to derogate from a rule of international law, customary or conventional. Particular interest therefore attaches to legislative and, in particular, constitutional provisions authorizing courts to apply international law notwithstanding any conflicting legislative enactments. Such provisions may take various forms. They may authorize a particular court to enforce international law despite the existence of conflicting statutes. Thus the United States Court of Claims, the jurisdiction of which is wholly statutory,[1] and which has been empowered at times to act as a quasi-international tribunal, has held that

> 'if there was any conflict between the municipal law of the United States as exemplified in the statute, and well recognised principles of international law, the latter must prevail in this court in the determination of the rights of the parties . . . as that is the law common to both parties'[2]

and that it was an 'international tribunal applying international law to international parties'.[3] Alternatively, one particular international instrument may be given a special standing. Thus Article 178 of the Constitution of the Weimar Republic provided: 'Provisions of the Treaty of Peace concluded on June 28, 1919, at Versailles are unaffected by the Constitution.' Or, again, a law may expressly recognize that, should any of its provisions conflict with international law, international law must prevail. Thus Article 3 (1) of the Italian Criminal Code provides that 'Italian criminal law is binding on all persons, whether nationals or aliens, who are within the territory of the state, subject to the exceptions established by the public law of Italy or by international law'. In the case of *In re Mittermaier*[4] the Italian Court of Cassation explained the insertion of that exempting clause by reference to 'the existence of binding principles which are founded on international law and which must prevail over domestic law which conflicts with them'.

Such provisions are strictly limited in effect. Of greater importance are enactments which, analogously to the principle of construction adopted by courts, provide that certain classes of legislation are to be considered to maintain existing treaties in force, even though apparently in conflict with them. A striking example of such an enactment is provided by a French decree of 28 May 1943. With reference to the legislation on leases, excluding aliens from its benefits, which had already repeatedly, but not generally, been interpreted by the courts so as to accord with conventions providing for the 'national treatment' of subjects of the signatory states, it provided:

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[1] *Gordon* v. *United States* (1891), 26 Ct. Cl. 309.

[2] *The Ship Rose* (1901), 36 Ct. Cl. 290, 301–2. See also *The Schooner Nancy* (1892), 27 Ct. Cl. 99, 109; *The Schooner Jane* (1901), 37 Ct. Cl. 24, 29.

[3] *The Schooner Endeavour* (1904), 44 Ct. Cl. 242, 272. It has been pointed out that that may be true of any municipal court called upon to apply international law in a dispute between the subjects of different states.

[4] *Foro Italiano*, 69 (1944–6), i, p. 137.

> 'Nonobstant toutes dispositions restrictives, les lois de droit commun ou d'exception, relatives aux baux à loyer et aux baux à ferme, réservent nécessairement le cas des ressortissants étrangers des pays qui offrent aux Français les avantages d'une législation analogue ainsi que celui des ressortissants étrangers dispensés par convention internationale de cette réciprocité, et sont en conséquence applicable à ces étrangers.'[1]

That law, together with the principles of construction discussed above, was repeatedly invoked by courts in connexion with the laws of 17 October 1945 and 13 April 1946 on leases which, again, excluded aliens from the benefits to be derived thereunder.[2] In the case of *Chonchol* v. *Dame Vita*,[3] in particular, the Court of Appeal of Aix, in a striking passage, took full account of the rationale of the law. Similarly, the French Nationality Code of 19 October 1945 provides in Article 2:

> 'Les dispositions relatives à la nationalité contenues dans les traités ou dans les accords internationaux dûment ratifiés et publiés s'appliquent même si elles sont contraires aux dispositions de la législation interne française.'

Finally, there are some constitutional provisions the express or implied effect of which is to prevent the abrogation of treaties or of customary international law by an ordinary legislative enactment. With regard to customary international law it was suggested by some authors[4] that Article 4 of the Constitution of the Weimar Republic gave the rules of international law adopted into German law thereunder the standing of constitutional law, and that these rules could therefore be amended or repealed within Germany only by an enactment adopted by the majority requisite for constitutional amendments (*Verfassungsdurchbrechung*). German courts were never called upon to pronounce with finality upon that question.[1] The statement of the *Reichsfinanzhof*, in its decision of 8 August 1928,[2] to the effect that a later special law derogates from rules of international law with which it conflicts, was *obiter*; moreover, it did not discuss the question whether there were any special requirements of form for the enactment of such a statute. However that may be, the question is now only of historical importance. Article 25 of the *Grundgesetz für die Bundesrepublik Deutschland*, 1949, provides as follows: 'The general rules of international law are part of the law of the Federation. *They are superior to Federal laws*[3] and create rights and duties directly for the inhabitants of Federal territory.' It is now clear that ordinary laws cannot derogate from the principles of international law, but there would appear to be still some doubt whether the phraseology of the article, in speaking of *Gesetz*, implies that enactments which, by the special procedure of their adoption, fulfil the requirements of a constitutional enactment, can override rules of international law, or whether these rules cannot be repealed or amended unless, by a constitutional amendment, Article 25 is itself radically altered. In either case the procedure would be such that the legislature would be compelled to manifest in the clearest manner its intention of violating a rule of international law —a process to which it is not likely to resort lightly. The provision of the French Constitution of 27 October 1946[4] relating to customary international law, is more difficult to interpret. The Constitution provides, in its preamble: 'La République française, fidèle à ses traditions, se conforme aux règles de droit public international.' It is not clear whether this provision implies a constitutional limitation on the power of the legislature to enact legislation which conflicts with international law. The same problem arises with regard to Article 10 of the Italian Constitution of 27 December 1947, which is almost identical in tenor. To both provisions arguments similar to those put forward in relation to Article 4 of the Weimar Constitution could be applied.[5] Unlike that provision, moreover, they appear to require expressly that legislation should be in conformity with the rules of international law.

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[1] *Sirey*, 1943, *Lois Annotées*, p. 1315.

[2] See, e.g., *Lambert* v. *Jourdan* (*Revue critique de droit international privé*, 37 (1948), p. 493); *Brain* v. *Thureau* (ibid., 38 (1949), p. 307); *Lublinsky* v. *Daviet* (*Dalloz*, 1950, *Jurisp.*, p. 88); *Poinsot* v. *Kurica* (*Revue critique de droit international privé*, 88 (1949), p. 308); *Ascher* v. *Gabrelle* (*Dalloz*, 1948, *Jurisp.*, p. 282); *Riss* v. *Zbinden* (*Dalloz*, 1947, p. 35); *Verbrigghe* v. *Bellest* (ibid., p. 396); *Cogez* v. *Ciscato* (ibid., p. 68, *obiter*); *Oncins* v. *Vuillemot* (ibid., p. 202, *obiter*); *Quetglis* v. *Tricon* (ibid., p. 392, *obiter*); *Re Ramadio* (*Sirey*, 1948, Part i, p. 107); *Boullet* v. *Sawicki* (*Dalloz*, 1948, p. 123). In some cases, however, it was held that a law of 1943 could not be invoked in relation to later legislation. 'The law of 1943 could not bind a later legislature, which has the power to abrogate that law or to ignore it' (*David* v. *Van Meule*, *Dalloz*, 1947, p. 201); see also *Clément* v. *Mardegan* (ibid., p. 200); *Lamerant* v. *Fouquier d'Hérouel* (*Sirey*, 1947, Part ii, p. 137). That argument was, in turn, rejected on the ground that it was open to the legislature to repeal the law of 1943, and that its failure to do so implied the continued validity of the law (*Cogez* v. *Ciscato*, *supra*).

[3] *Sirey*, 1948, Part ii, p. 83.

[4] See notably Walz, *Völkerrecht und Staatliches Recht* (1933), pp. 320–36.

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[1] The question, indeed, still remains open whether courts of European countries with written constitutions could, in the manner of the Supreme Court of the United States, pass on the constitutionality or otherwise of legislation. In Germany under the Weimar Constitution a strictly limited jurisdiction to take cognizance of disputes relating to the constitution was, by Art. 19, vested in the *Staatsgerichtshof* (see Anschütz, *Die Verfassung des Deutschen Reichs*, 3rd ed., 1930, pp. 152 ff.). Other courts were held by many to be unable to inquire into the constitutionality of laws (see, e.g., ibid., pp. 322 ff.). But some courts were beginning to assert the contrary. See, e.g., the decision of the *Reichsgericht* of 4 November 1925 (*R.G.Z.* 111, p. 323); and of the *Reichsfinanzhof* of 7 December 1926 (*Deutsche Juristen Zeitung*, vol. 32, col. 233). In the *Grundgesetz* of Bonn of 1949 the power to apply international law in derogation of national law is given primarily to the *Bundesverfassungsgericht* (Art. 100, para. 2).

[2] *R.F.E.* 24, p. 72, cited above, at p. 71.

[3] Italics are the writer's.

[4] *Sirey*, 1947, *Lois Annotées*, p. 545.

[5] Here, again, the question arises whether French courts can review the constitutionality of laws. A proposal to establish judicial review of legislation was rejected by the French Constitutional

With regard to treaties the earliest constitutional provision was Article 11 of the Shereefian Dahir Organizing the Administration of the Tangier Zone, which incorporated into municipal law the Paris Convention of 16 December 1923 on the Organization of the Statute of the Tangier Zone. It provided:

> 'The Administration of the Zone shall respect the Treaties at present in force between Us and the Powers. International agreements to which all the Powers signatories of the Act of Algeciras are Contracting Parties or shall have acceded shall apply automatically to the Tangier Zone. In case of any divergence between the provisions of these Treaties and the laws and regulations passed by the International Legislative Assembly, the provisions of the Treaties shall prevail.'

In applying that provision in the case of *Public Prosecutor* v. *Aerts*[1] the Appeal Section of the Mixed Court of Tangier expressed the view that

> 'the solution of the question whether or not to apply laws which are contrary to treaties is based upon the principle of the supremacy, before the Mixed Tribunal, of international law over municipal law',

and held that it was its duty to disallow and to refuse to follow laws which were contrary to treaties. The Court drew attention to the unique character of the Constitution of Tangier, which was semi-international, and was based wholly on treaty provisions, and admitted that in the sphere of municipal law proper the doctrine of the separation of powers might prevent courts from acting in this way. However, very similar constitutional provisions have now been enacted in a country whose constitution partakes of none of the peculiarities of the organization of the Tangier zone. Articles 26 and 28 of the French Constitution of 27 October 1946 provide as follows:

> 'Les traités diplomatiques régulièrement ratifiés et publiés ont force de la loi dans le cas même où ils seraient contraires à des lois internes françaises, sans qu'il soit besoin pour en assurer l'application d'autres dispositions législatives que celles qui auraient été nécessaires pour assurer leur ratification.
>
> 'Les traités diplomatiques régulièrement ratifiés et publiés ayant une autorité supérieure à celle des lois internes, leurs dispositions ne peuvent être abrogées, modifiées ou suspendues qu'à la suite d'une dénonciation régulière, notifiée par voie diplomatique.'[2]

These provisions are the climax of a development of judicial interpretation and minor legislation and, as such, represent the considered affirmation by the French state of the supremacy of international law. They have

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Assembly (*Séances de la Commission de la Constitution, Comptes rendus analytiques* (1946), p. 344).

[1] *Annual Digest*, 1938–40, Case No. 23.

[2] See also Art. 67 of the Constitution of the German Land of Hesse: 'No law is valid which is in conflict with rules of international law or with a treaty.'

already been regarded as such by the French courts. Thus, in *Chonchol* v. *Dame Vita*[1] the Court of Appeal of Aix, after affirming its own belief in the superiority of diplomatic conventions over municipal legislation, found that its view was emphatically confirmed by the Constitution of 1946. Similarly, the Court of Appeal of Paris, in *Lambert* v. *Jourdan*,[2] decided on 30 January 1948, and in *Ascher* v. *Gabrelle*,[3] decided on 11 March 1948, while holding that the mere declaration that a legislative provision was of an exceptional nature and therefore restricted to nationals could not in any case justify a failure to execute international obligations providing for national treatment of aliens, found that 'the special authority of international treaties is more strongly affirmed now that the new Constitution has formally proclaimed it'. It held, moreover, that Articles 26 and 28 of the Constitution 'undoubtedly contemplate not only treaties which may be concluded after the promulgation of the Constitution, but also treaties already in force. . . .' In *Capello* v. *Marie*,[4] decided on 10 February 1948, the Court of Cassation affirmed the superiority of treaties over domestic law. In *Kober* v. *Chollet*,[5] decided on 18 February 1949, the Court of Appeal of Paris held that, by virtue of the provisions of the Constitution, the Geneva Convention of 1938 on Refugees had the force of law even though it conflicted, in some particulars, with French legislation. In *Fraenkel* v. *Cie 'La Vita'*,[6] decided on 5 May 1949, the Tribunal Civil de la Seine stressed that, by virtue of the provisions of the Constitution, a conflict between national legislation and an international treaty must be resolved by the application of the treaty.

V. *Conclusions*

The last section demonstrates that state organs, though in theory free to exclude or obstruct the operation of international law in the municipal sphere, in fact endeavour to facilitate it. That, indeed, is the conclusion which emerges from a study of the whole subject. The cause of this attitude appears plainly from a survey of the decisions of international organs on the question of the relationship between international and municipal law. As the rules of international law are admitted to be binding upon states, the non-observance of such provisions as ~~fall~~ '[illegible]' no fall, to be applied within the state involves individual or collective responsibility in the international sphere. Municipal law in violation of international law may have legal effects within the restricted sphere of the state concerned, but its enforcement is an illegality from the point of view of international tribunals. Similarly, failure to enforce the rules of international law, owing to a general denial of its enforceability, gives rise to an international cause of action. The subject is somewhat obscured by the fact that, owing to the absence of compulsory judicial settlement in the international sphere, responsibility is not always the automatic consequence of violation of rules of law. But it is nevertheless true that states show remarkable concern not to appear as law-breakers before the world at large. That being so, the problem of the relationship between international law and municipal law in the municipal sphere is mainly one of machinery.

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[1] See above, p. 87. But see *David* v. *Van Meule*, *Dalloz*, 1947, p. 201, decided a few days after the promulgation of the Constitution, in which it was held that 'le législateur a le pouvoir, malgré l'existence de conventions diplomatiques, d'instituer une législation nouvelle réservée, en raison de son caractère très particulier, aux Français . . .'. It is not clear whether that statement was intended to imply that such a law would not directly infringe the treaty. The Court did not refer to the provisions of the Constitution.

[2] *Revue critique de droit international privé*, 37 (1948), p. 493.

[3] *Dalloz*, 1948, *Jurisprudence*, p. 282.

[4] *Revue critique de droit international privé*, 37 (1948), p. 491. The law, in that case, was earlier in date than the treaty.

[5] Ibid., 38 (1949), p. 516.

[6] Ibid., 39 (1950), p. 73.

For the enforcement of international law two main types of machinery have been employed; they have been characterized by reference to 'dualist' and 'monist' theories respectively. Two significant facts emerge from a study of these two methods. In the first instance, the 'monist' theory, which permits the direct enforcement of international law in the municipal sphere, is increasingly displacing the 'dualist', with its requirement of 'transformation' of rules of international law into municipal law. Secondly, even under the latter method states have been much concerned to see that rules of international law are, in fact, transformed and, accordingly, applicable in municipal courts to the relations of private parties.

At the same time, the circumstance that the enforcement of international law in the municipal sphere is wholly dependent on municipal machinery has involved certain limitations on the operations of international law. For municipal courts are bound to implement the will of the state as expressed by its legislative organs or, in certain circumstances, as manifested by executive acts. In order to prevent violations of international law in this connexion courts have strained their powers to the utmost in refusing to recognize that a violation of international law was intended unless such an intention was expressed in the most unequivocal terms. Moreover, in a small number of countries provisions have now been enacted in the fundamental law of the state which are intended to ensure the supremacy of international law over conflicting provisions of municipal legislation. A limitation on the power of the legislature to impose its will on the courts in defiance of international law represents almost the highest point of development which is possible, in this connexion, within the framework of existing international organization. Only the full integration of international society, by giving international law the means of enforcing its authority directly within the state, can establish the supremacy of international law in its fullest sense.

It would thus seem that the practice of some countries has reached what Professor Lauterpacht has called an 'intermediate stage' in the development towards the supremacy of the law of nations over the law of the land.[1] The process is not, as yet, very general. Nor is it in any way final—it is of the essence of a process of development that there may be regressions, and it remains within the power of the states concerned to amend or repeal their constitutions. But the significance of the constitutional trend lies not in what it has already achieved, but in the fact that states have felt impelled to provide, in their most fundamental law, for the supremacy of international law within the state.

[1] In *Transactions of the Grotius Society*, 25 (1939), p. 88, n.

ECONOMIC CONCESSIONS IN THE LAW OF STATE SUCCESSION

By D. P. O'CONNELL, PH.D. (Cantab.)

SINCE the publication of the Report of the Transvaal Concessions Commission, and the thesis erected upon that Report by the late Professor Keith,[1] little attention has been paid to concessions as a specific category of private rights in relation to state succession.[2] The Commission treated concessions as species of administrative contracts. It argued that the change of sovereignty having terminated the contract, no obligation with respect to it devolved on the successor state. That theory was not without influence in the subsequent practice of Great Britain. It is probably not supported by the practice of other states. Recently the Opinions of the Law Officers of the Crown covering the period following the annexation of the Boer Republics have been made available. In the light of them the 'negative' attitude of the Transvaal Concessions Commission and of Professor Keith and his followers requires re-examination.

I. *The nature of a concessionary contract*

An economic concession is usually a licence granted by the state to a private individual or corporation to undertake works of a public character, extending over a considerable period of time, and involving the investment of more or less large sums of capital. It may also consist in the grant of mining or mineral and other rights over state property. To this type of concession there are usually annexed rights of marketing and export, as well as provisions concerning royalties. Thirdly, a concession may be merely a grant of occupation of public land for the carrying on of some public purpose, such concession taking the form of a contract between the state and the concessionaire. Of this type were the concessions granted by the Queen of Madagascar to English mission societies for the erection of hospitals, which will be discussed in due course.

According to the definition which Professor Gidel adopted from Auroc,[3] a concession is 'a contract by which one or several persons are engaged to execute certain work in consideration of being remunerated for their efforts and expenses, not by a sum of money paid directly to them by the administration after the completion of the work, but by the receipt of a return levied for a more or less lengthy period of time on the individuals who profit from the work'.[1] It is, as Mosler describes it, 'the grant to an individual of rights under municipal law which touch public interest'.[2] Beyond this, he points out, the term 'concession' has no fixed legal meaning.[3]

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[1] *The Theory of State Succession* (1907), pp. 69 ff.

[2] Professor Gidel's book, although published in 1904, and therefore no longer exhaustive, is still, in matter of doctrine, valuable and instructive: *Des effets de l'Annexation sur les Concessions* (1904). Professor Hershey analysed the question in 1911 in the *American Journal of International Law*, 5 (1911), pp. 294 ff. Professor Sayre, in an article published in 1918, sought to formulate the view of the United States with respect to concessions (ibid., 12 (1918), pp. 705 ff.). The most adequate treatment of the subject is to be found in Dr. Mosler's recently published work, *Wirtschaftskonzessionen bei Änderungen der Staatshoheit* (1948).

[3] *Conférence sur les Droits administratifs*, vol. ii, p. 269, No. 615.

An economic concession thus embodies the following characteristics: It is a contract between a public authority and the concessionaire. It involves the investment of capital by the latter in an undertaking for the erection of public works or the exploitation of the public domain. The reward which the concessionaire expects to derive is usually in the form of profits which the public authority, under the terms of the contract, permits him to make. It may also consist in subsidies paid by the public authority itself. In the case of a concession for the exploitation of public lands there is usually provision for the payment to the public authority of royalties on the profits. Whatever be its form, a concession always involves a more or less complicated system of reciprocal rights and duties between the concessionaire on the one hand and the state on the other.[4]

This relationship is one of mixed public and private law. It comes into being, as the Arbitrator appointed to interpret Article 160 of the Treaty of Versailles pointed out, through the grant 'by the State, or by an authority dependent on the State, by special Act, in virtue of a power which in principle was of a discretionary character'.[5] The contract is thus constituted in the first instance under public law, but it gives rise to rights of a subjective private nature. Although it is at times difficult to decide whether it is the public or the private aspects of a concessionary contract which are predominant, there is little doubt that the interest which the concessionaire acquires is one governed and protected by private law.

A concession of this kind may thus readily be distinguished from an outright conveyance of land,[6] and from a licence to practise a profession,[7] both of which grants are sometimes referred to as concessions. For this reason a concession in this context is described as an economic concession. It differs from an ordinary grant of land in two principal respects: in the first instance, the state, which is one party to the contract of concession, is subject to a positive contractual duty. Secondly, the concessionaire has the right to extend the operation of the concession beyond the limits of the land subject to exploitation, as, for example, in the marketing of products.[1] Since an economic concession involves on the one hand the occupation of land, and on the other a system of contractual relationships with the state, it is an interest at once corporeal and incorporeal,[2] and stands midway between the category of a debt owed by the state and the category of the private ownership of land.[3]

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[1] Op. cit., p. 123. The concessions maintained in the Treaty of Zurich, 1859, included railways built at the private expense of the concessionaire, reimbursement being effected out of income derived therefrom.

[2] Op. cit., p. 66.

[3] Ibid., p. 79.

[4] Ibid., p. 74.

[5] *Annual Digest of Public International Law Cases*, 1923–4, Case No. 200. The article in question provided for the transfer to the Reparations Commission of German concessions in certain successor states. The arbitration was concerned with the application of this article to Germany's allies.

[6] Mosler, op. cit., p. 77; Gidel, op. cit., p. 105.

[7] Mosler, op. cit., p. 76.

II. *Economic concessions and the doctrine of acquired rights*

Upon change of sovereignty the successor state does not automatically inherit the rights and duties comprised in the contract of concession.[4] These come to an end with the extinction of the personality of one of the parties to the contract, or the obliteration of its sovereignty in the territory which is subject to the operations of the concession. To admit the contrary would be to admit the doctrine of universal succession with all its implications. The treatment of the problem of concessions in the law of state succession is not exhausted, however, by an analysis of the effect of the change on the concessionary contract. Consideration must be given to the question whether the successor state incurs an obligation towards the concessionaire on a basis other than contractual. The latter has invested money and performed work, and thus brought into being a certain state of facts. To this extent the concession constitutes more than a mere *vinculum juris* between him and the state. Apart from his contractual rights, the concessionaire has an equitable interest in his investment and labour. The contractual duty expires with the change of sovereignty, but the equitable interest in the factual situation survives. This interest is described variously as an 'acquired right', 'property right', or 'vested right'.[5]

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[1] Gidel, op. cit., p. 116.

[2] Ibid., p. 128. See Fiore, *Nouveau Droit international* (2nd ed., 1885), vol. i, p. 312.

[3] Dr. Mosler suggests that the obligations owed by the conceding state under the contract of concession are closely assimilated to the obligations of administrative debts (op. cit., pp. 143–4).

[4] Professor Udina finds it difficult to speak of 'succession'. There is, he holds, only a duty created by international law and imposed at the moment of change of sovereignty upon the successor state (in *Recueil des Cours de l'Académie de droit international*, 44 (1933), p. 754).

[5] Descamps in *Revue générale de droit international public*, 15 (1908), p. 394; Lauterpacht, *The Function of Law in the International Community* (1933), pp. 90–91. Professor Scelle insists that respect for property implies respect for contracts and debts (*Précis de droit des gens* (1934), Pt. II, p. 120). See also Gidel, op. cit., pp. 110, 124; Kaeckenbeeck in this *Year Book*, 17 (1936), p. 10. The Report of the Transvaal Concessions Commission, and its quotation of the case of *U.S.* v. *Percheman* (6 Pet. 61, at p. 86), seems to equate concessions with real property: see *infra*, p. 96. 'Concessions', says Professor Verdross, 'are acquired rights' (*Recueil des cours de l'Académie de droit international*, 37 (1931), p. 364). The *Delagoa Bay Arbitration*, although concerned with a concession, proceeded on the basis that the interest of the concessionaire constituted an acquired right (Fachiri in this *Year Book*, 6 (1925), p. 166). This arbitration arose out of

The doctrine of acquired rights, although not adequately defined either in literature or in judicial and diplomatic practice, has long been accepted in international law, and has been sanctioned by a considerable body of decisions of international and municipal tribunals.[1] It is not restricted in its operations to corporeal interests,[2] but includes all 'things and rights considered as having a money value . . . such as trade marks and copyrights, patents and rights in personam capable of transfer and transmission as debts'.[3] The Upper Silesian Arbitral Tribunal, in interpreting the term 'acquired rights' as used in Article 4 of the Geneva Convention of 1922, specified in some detail the elements of which it is composed. It determined that an interest, to fall within the definition of an acquired right, must consist in an undertaking or investment of a more or less permanent character and of liquidated monetary value.[4] Rights which are unliquidated have been held by other tribunals to be outside the scope of acquired rights, and hence not subject to protection under international law.[5]

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a dispute between Great Britain and Portugal following the cancellation by the latter of a concession granted by it to a Portuguese company, in which a British company had the predominant interest.

[1] See the decisions of the following tribunals: The Permanent Court of International Justice: *Settlers of German Origin in Territory ceded by Germany to Poland, Publications of the Court*, Ser. B, No. 6; *Certain German Interests in Polish Upper Silesia*, ibid., Ser. A, No. 7; the British-American Claims Tribunal: *Claims of Burt and Webster*, Nielsen, *American and British Claims Arbitration* (1926), pp. 588 ff. and 534 ff.; the Roumanian-Hungarian Mixed Arbitral Tribunal: *Kulin Emeric* v. *Rumanian State, Annual Digest*, 1927–8, Case No. 59; the Hungarian-Jugoslav Mixed Arbitral Tribunal: *Thalheimer* v. *Jugoslav State*, ibid., Case No. 60. The doctrine of acquired rights has been upheld in a long series of American cases such as: *U.S.* v. *Percheman*, 7 Pet. 61, at p. 86; *Strother* v. *Lucas*, 12 Pet. 410, at p. 435; *Ely's Administrators* v. *U.S.*, 171 U.S. 220, at p. 223; *Coffee* v. *Groover*, 123 U.S. 1, at p. 9; *U.S.* v. *Soulard*, 4 Pet. 511, at p. 512; *Propagation of the Gospel in Foreign Parts* v. *Town of New Haven*, 8 Wheaton 464, at p. 498; *Mitchell* v. *U.S.*, 9 Pet. 711, at p. 734; *Delassus* v. *U.S.*, 9 Pet. 17; *Mutual Assurance Society* v. *Watts*, 1 Wheat. 277, at p. 279; *U.S.* v. *Arrendondo*, 6 Pet. 691, at p. 712; *U.S.* v. *Roselius et al.*, 15 How. 31. See also the following decisions: The Judicial Committee of the Privy Council: *Amodo Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 899 (*per* Lord Haldane); the French Cour de Cassation, *Dalloz, Jurisprudence Générale, Recueil Périodique et Critique fondé par MM. Dalloz* (1862), vol. i, p. 355; ibid. (1866), vol. i, p. 374; the Swiss Federal Court: *In re Potters' Works of Ziegler Brothers, American Journal of International Law*, 1 (1907), p. 237, at p. 242; the Supreme Court of Palestine: *Heirs of Mohammed Selim* v. *The Government of Palestine, Annual Digest*, 1935–7, Case No. 39; the Reichsgericht: *Fontes Juris Gentium*, Ser. A, sect. II, vol. i, p. 118.

[2] Professor Gidel argues that the definition of acquired rights covers the legal relations of individuals one to another, including judgment debts and marital and family relations, and cites a number of French cases in support (op. cit., p. 87). On the other hand, Dr. Feilchenfeld adheres to the older theory that incorporeal rights, among which he specifically includes concessions, are to be 'distinguished from acquired rights to tangible property' (*Public Debts and State Succession* (1931), p. 626).

[3] Byrne, *A Dictionary of English Law* (1923), p. 709.

[4] *Jablonsky* v. *German Reich, Annual Digest*, 1935–7, Case No. 42; *Kügele* v. *Polish State*, ibid., 1931–2, Case No. 34; *Niederstrasser* v. *Polish State*, ibid., Case No. 33.

[5] *The Robert E. Brown Claim*, an arbitral award given by the American-British Claims Tribunal in 1923 (Nielsen, op. cit., pp. 162 ff.); *The Hawaiian Claims*, decided by the same Tribunal (ibid., pp. 91 ff.); *Niemiec and Niemiec* v. *Bialobrodziec and (Polish) State Treasury, Annual Digest*, 1923–4, Case No. 33; *Olpinski* v. *Polish Treasury (Railway Division)*, ibid., 1919–22, Case No. 36.

Upon change of sovereignty it is now well established that an acquired right survives, and that with respect to it an obligation is imposed upon the successor state. The interest which the possessor of the right enjoys in the factual situation may not be destroyed without the state satisfying the equities involved. As applied to the interests of creditors of the public debt, parties to administrative contracts, and pensioned public officials, the doctrine of acquired rights thus offers a convenient and stable solution for the various problems of state succession.

The judicial and diplomatic practice of states in the matter of concessions can conveniently be considered in two sections. In the first place, it is necessary to inquire to what extent such practice establishes the duty of the successor state to respect the interest of a concessionaire as an acquired right.[1] Secondly, it is necessary to examine the juridical character of any such duty.

III. *Judicial and diplomatic practice in the matter of concessions*

(i) *Cession of the Ionian Islands to Greece, 1864.* When negotiations were pending in 1863 for the transfer of the Ionian Islands from British protectorate to Greek sovereignty, the Austrian Foreign Minister informed the British Ambassador at Vienna that he was disturbed at the fate of concessions which had been granted in the Islands to the Austrian Lloyd Company. He contended that such concessions ought not to be interfered with. It could not be admitted that 'an obligation contracted by either side should cease because the territory passed into other hands', and he insisted that the stipulations of the contract of concession should continue to be binding on the administration of the Islands after the cession.[2] Upon receipt of this correspondence the Foreign Office requested the Law Officers to advise 'on the general question of the validity, in the event of the cession of the Ionian Islands to Greece, of contracts made by the Government of those Islands, when under the protectorate of Great

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[1] Concessions were specifically mentioned as obligating the successor states in the following treaties: Treaty between Prussia and Holland, 1816, *British and Foreign State Papers*, vol. iii (1816), p. 720, Art. 31, at p. 731; Treaty of Zurich, 1859, *Nouveau Recueil Général fondé par M. Martens*, vol. xvi, Pt. II, p. 516, Art. 11 at p. 521; Convention between France and Sardinia to settle questions arising out of the union of Savoy and Nice to France, ibid., vol. xvii, Pt. II, p. 22, Art. 6 at p. 24; Treaty of Vienna, 1866, ibid., vol. xviii, p. 405, Art. 7 at p. 407. The Additional Convention to the Treaty of Frankfort of 11 December 1871 transferred to Germany all concessions in mines in Alsace-Lorraine, ibid., vol. xx, p. 847, Art. 13 at p. 855. Germany refused to acknowledge concessions respecting the Alsace-Lorraine railways, but only because the concessions had not been ratified by the French Government (Mosler, op. cit., p. 130). The Act of the Congress of Berlin, 1878, substituted Bulgaria for the Ottoman Empire in its obligations towards the Rutschuk–Varna Railway (ibid., 2nd ser., vol. iii, p. 447, Art. 10 at p. 454). Similar provision was made with respect to Serbia and Roumania. These stipulations were accepted by the delegates 'without discussion' (Protocol 7 to the Act of the Congress, *Parliamentary Papers*, 1878, vol. 83 (C. 2083), Enclosure 3 in No. 18, p. 85).

[2] *Parliamentary Papers*, 1864, vol. 66 (3347), No. 5, p. 5.

Britain'. The Law Officers, one of whom was Sir Robert Phillimore, stated that they entertained 'no doubt upon the general question of the continued obligation of all lawful contracts, existing at the time of the cession of these Islands to the Kingdom of Greece'. 'Both according to the principles of International Law,' they advised, 'and the practice of all civilised States, ceded territories pass, *cum onere*, to the new sovereign.'[1]

(ii) *Annexation of Peruvian territory by Chile, 1884.* In 1884 Chile annexed the Province of Tarapaca from Peru and cancelled the concession of the Nitrate Railway Company, a British corporation, and invited tenders for the construction of competing railway lines. Attempts made by the company to have its claims adjudicated in the Chilean courts were frustrated by actions of the Government of that country, and the company eventually appealed to the British Government, and requested that it protest against the violation of the terms of the concession. Before taking such action the Foreign Office sought from the Law Officers an opinion as to the grounds upon which a diplomatic Note might be based. The latter advised that 'His Majesty's Government would be justified in protesting against the proposed infraction of the exclusive privilege granted by the Concession'. There had been no breach of the terms of the Concession on the part of the company, and if the Chilean Government alleged that there had the company was entitled to have 'the question of the legality of the forfeiture of the Concession determined in due course of law by the Chilean Tribunals'.[2]

(iii) *Annexation of Madagascar by France, 1896.* The question of the maintenance of concessions by a successor state became a diplomatic issue on a larger scale in connexion with the annexation of Madagascar by France on 6 August 1896. A projected treaty of cession which was appended, before the decree of annexation, to the instructions given to the French Resident General, specified that 'the Government of the French Republic does not assume any responsibility by reason of . . . concessions which the Government of Her Majesty the Queen of Madagascar had contracted before the signature of the present treaty'.[3] Acting upon his instructions, the Resident General required the holders of concessions to prove the validity of their instruments of title, and to conform to certain French ordinances which were promulgated for their 'regularization'. Those who did not comply with these requirements were to be considered as having renounced their concessions.[4]

The United States took the view that this requirement was not binding upon American concessionaires, whose rights were considered inviolable, and instructions to this effect were contained in a dispatch of the Secretary of State to the American Ambassador at Paris on 29 May 1897. To the overtures of the Ambassador the French Minister of Foreign Affairs replied that the only purpose of the requirement was 'to establish the validity of the said concessions, and would not affect property acquired in a regular manner'.[1] After a consideration of this reply the Secretary of State informed the Chargé d'Affaires at Paris that 'this Government cannot admit the right of the French Government, in the event of the non-compliance of any American citizen with the order in question to treat his concession as forfeited or subject to disposition by that Government'.[2]

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[1] Opinion of 15 August 1863, F.O. 83/2287.

[2] F.O. *Confidential Papers* (6113), No. 5; Opinion of 10 February 1890.

[3] *Revue générale de droit international public*, 4 (1897), p. 231, n. (2), Art. 6.

[4] Moore, *A Digest of International Law*, vol. i (1906), p. 387.

Great Britain took up a corresponding attitude and addressed protests to France on behalf of a British firm, Messrs. Harrison Smith & Company. That firm, which possessed mining concessions in Madagascar, was informed by the Resident General that 'though the French Government attached no value to the ancient contracts they had decided to recognize, as far as was permitted by the new Law, the rights of priority acquired by persons already established'. The firm was accordingly invited to 'regularize' its concession, but in the meantime the sale of its products without authorization was prohibited. The application of the company for the 'regularization' of its concession resulted in a disagreement between it and the French Government, and the latter registered the claims of other persons to lands in districts covered by the concession.[3] The company thereupon invoked the assistance of the British Government, and its claims were referred to the Law Officers for opinion. In its reference to them the Foreign Office stated that it was disposed to think that a 'formal protest' should be made to the French Government against the application of the law 'to destroy rights and privileges regularly granted to British subjects by the proper authority, previous to the annexation of Madagascar by France'. The attention of the Law Officers was drawn to the previously quoted correspondence between the United States and France, and the Foreign Office considered that concessions granted to British subjects should be treated on the same footing. The Law Officers advised on 3 March 1899 that:

> 'These concessions were private property, and there is no pretence for saying that they can be forfeited on the conquest of the island by the French. . . . The French Government, pending negotiations as to the recognition of these concessions, have allotted to others the ground covered by them. We are unable to see on what ground of international law, and of ordinary justice, the course pursued by the French Government in this matter can be defended.'[4]

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[1] Moore, op. cit., p. 388.

[2] Letter of 12 August 1897, ibid., p. 388.

[3] Opinion of 3 March 1899, F.O. *Confidential Papers* (7356), No. 24.

[4] Ibid. The company had arranged with the previous Resident General to export gold from its mines free of duty according to the terms of its concession. The Law Officers were of opinion that 'the ore was extracted by them on the faith of the assurance given by M. Laroche

References were also made to the Law Officers on the question of concessions granted by the Queen of Madagascar to British missionaries to erect and maintain hospitals on public land. Attempts had been made by the Queen during the period of the French Protectorate over the Island to eject certain of these missionaries, and after the annexation the French authorities, relying on the proceedings of the Queen, requisitioned one of the hospitals. The missionaries objected on the ground that the compensation offered was quite inadequate, and appealed to the British Government. The Law Officers, to whom the question was referred, felt no doubt

> 'that on the true construction of the instrument the use of the land on which the hospital is built was granted by the Queen to the missionaries so long as it should be used for hospital purposes. We cannot see any justification for the resumption, nominally by the Queen, of the land and buildings. It appears to us to be a mere act of spoliation'.

Accordingly, they recommended that the matter be taken up diplomatically with the French Government, and that the claim should be based on the terms of the grant.[1]

The latter, however, took the view that under French law all religious buildings were the property of the state, and on this ground sought to justify the expropriation of mission concessions. No satisfaction being obtained, the Foreign Office referred the question to the Law Officers, and suggested that 'the fact that the original Agreement was made at a time when Malagasy, and not French law, governed the matter was of importance'. The Law Officers advised on 2 February 1898 that

> 'the grants made by the Malagasy Queen for hospital purposes—while reserving to the Queen the title to the land—amount in substance to a contract that so long as it was used for the purposes mentioned in the grant, the holders would not be disturbed. It appears to us that the French Government inherited this obligation, and that it would be a breach of contract if the holders of land under such grants were evicted, unless the land were wanted for public purposes and adequate compensation was paid.'[2]

(iv) *The Cession of Cuba and the Philippines by Spain, 1898.* The question of the maintenance of concessions was presented in a critical form for the

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that it might be exported. . . . We think that the French Government may be fairly asked to give effect to the arrangement made by M. Laroche, pending the regularization of the concession.' This opinion does not state any rule of law, but it appears to be based on the assumption that the decree of the French Resident General was ineffective to deprive the company of its concessionary rights (F.O. *Confidential Papers* (7058), No. 14).

[1] Ibid. (7058), No. 13, Opinion of 22 March 1897.

[2] Opinion of 2 February 1898, ibid. (7199), No. 16. According to Professor Gidel it is not certain that France refused to recognize the concessions as binding. He suggests that she relied on the terms of the concessions themselves to avoid fulfilling them (op. cit., p. 248). Dr. Mosler is of the opinion that the French Government drew a distinction between concessions granted by civilized countries and those granted in undeveloped countries. He suggests that while the former were recognized as binding, the latter were not (op. cit., p. 183). This was a distinction later to be drawn, to her own advantage, by Italy after the annexation of Ethiopia.

first time in the cases of transfers of territory that followed the Spanish-American War of 1898 and the Boer War. Among the British companies which had concessions in the ceded territories of Cuba and the Philippines were the Eastern Extension, Australasia and China Telegraph Company Ltd., the Cuba Submarine Telegraph Company, and the Manila Railway Company. From time to time the Law Officers rendered opinions to the Foreign Office with respect to the obligations which the United States had incurred towards these companies.

During the negotiations that preceded the treaty of peace between Spain and America the Spanish Commissioners listed the contracts which they suggested should be confirmed by the treaty. The American Commissioners replied that 'the United States does not propose to repudiate any contract found upon investigation to be binding under international law . . . and would deal justly and equitably in respect of contracts that were binding under the principles of international law'.[1] At a further stage in the negotiations the Commissioners repeated this assurance, and the Treaty of Paris confirmed all concessions properly granted.[2] There was therefore never any question that the United States felt itself obliged, as a general principle, to respect concessions. It was the interpretation of this obligation that brought the United States into collision with Great Britain.

In order that it be valid and binding on the successor state, the United States alleged that a concession must not only be related or attached to the territory ceded, but also granted for its exclusive benefit.[3] The Attorney-General of the United States advised his Government that the concession granted to the Manila Railway Company to build a railway in the Philippines had been inspired by Spanish imperialistic motives. Hence, he argued, it was not in the exclusive interest of the ceded territories, and the United States was not obliged to respect it. The most that could be said was that there was an obligation of equity imposed on the United States to compensate the concessionaire for the advantages which would accrue to the new administration from the laying of the railway.[4]

The Law Officers were requested by the Foreign Office to advise on the merits of this opinion of the Attorney-General, and they reported on 30 November 1900. They pointed out

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[1] Moore, op. cit., vol. i, p. 389.

[2] Ibid., p. 390.

[3] These conditions were deemed by the War Department to be fulfilled in the case of a concession to construct a canal in Cuba, and by the Attorney-General in the case of a concession to construct tramways in Havana. He also held that a concession to lay cables in Cuba had sufficient local identification and benefit to prevent the United States from granting similar privileges to other companies (Sayre, loc. cit., p. 712).

[4] 'The Provinces of the Philippines have undoubtedly received, and they retain and will retain, the chief benefit from the railroad; the revenues out of which that part of the benefit was to be paid for are now in the hands of their new government; the creditor was induced very properly to look to those revenues for that purpose' (Moore, op. cit., vol. i, pp. 399–404). 'To regard the concession as "exclusively for local benefit",' he said, 'would be to ignore obvious facts' (ibid., p. 402).

> 'that there is no warrant for the contention raised by the Attorney-General of the United States that the obligations undertaken by Spain in relation to the companies in question are divisible into those for the general benefit of Spain, and those exclusively for local benefit. To admit such a contention would leave it open, in all cases of conquest and cession, to the succeeding Government to repudiate the obligations of their predecessors on alleged grounds of motives which, even if they could be proved to have existed, cannot affect the rights of property secured to individuals or companies, as a consideration for executing works of local improvement. Such a contention is, in our opinion, contrary to the recognized principles of international law.'[1]

Reports were also rendered by the same Law Officers on the general question of the liability of the United States with respect to the concessions of the Eastern Extension and Cuba Telegraph Companies. In the case of the concession of the first-named company, the Spanish Government had been under a contractual obligation to pay annual subsidies to the concessionaire, and in consideration of this undertaking had the right to transmit messages at a reduced tariff. After the cession of the Philippines the United States used the facilities of the company, and paid for messages at the same rate as had the Spanish administration. She nevertheless refused to continue the subsidy. The Foreign Office advised the Law Officers that it was important for the company that the United States take over this obligation to pay subsidies, and requested an opinion on the point. The Law Officers gave their opinion on 4 January 1899:

> 'The United States are bound on taking possession of the Philippine Islands, or assuming effective control over them, whether under the form of a Protectorate or otherwise, to respect the Concessions granted by Spain to the Eastern Extension Company, both as to exclusive rights and as to subsidy. The obligation is one of a local nature, although contracted by the Government of Spain. On the faith of it, the Company has expended a large sum of money on works for the benefit of the Philippines, and the obligations in respect of the Concessions seem to us to belong clearly to that class of local obligations which have always been held to pass with the territory.'[2]

With respect to the Cuba Telegraph Company's concession, the United States took the view that she was only in military occupation of Cuba and was not obliged to permit the company to exercise rights granted by the defeated sovereign. The Law Officers were consulted on the validity of this argument. They considered that the occupation of Cuba by the United States was a direct exercise of sovereignty, and was not

> 'in the slightest degree analogous to a mere military occupation. It may or may not be temporary, but so long as it lasts it carries with it the obligation to respect such local obligations as the Concessions of the Telegraph Company. It need not be contended that the United States assumed absolute responsibility for the permanent

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[1] Opinion of 30 November 1900, F.O. *Confidential Papers* (7516), No. 44.

[2] Opinion of 4 January 1899, ibid. (7356). No. 52.

observation of these Concessions in Cuba, but they are bound to respect them during the occupation, and to "advise" any succeeding Government to do the like.'[1]

Acting on these various opinions, the Foreign Office instructed the British Ambassador at Washington on a number of occasions to present 'official' and 'unofficial' claims, chiefly for the payment of interest and subsidies under the concessions of the Eastern Extension and Manila Railway Companies. The substance of the British claims was that the burden of all concessions which relate to the ceded territory must be accepted by the cessionary state, and not merely those granted exclusively for local benefit. In a memorandum addressed to the United States Secretary of State the Ambassador said:

> 'The obligations contracted by Spain under these concessions are of a local nature and it will not be contested, as Her Majesty's Government believe, that they become binding on the United States' Government on their taking possession of the islands. . . . On the faith of these concessions the company has expended vast sums for the benefit of the islands, and the obligations in question clearly belong to that class of local obligations which have always been held to be transferred with the sovereignty and to pass with the territory.
>
> 'The question is really governed by general principles of international law as to the effect of conquest, and therefore Her Majesty's Government do not contend that the use by the United States Government of the Company's cable, without availing themselves of the Government's rights reserved by the concessions (such as those of free telegrams, etc.) would of itself render the concessions binding on them. But the use of the cable by the United States Government must fairly be mentioned as illustrating the local nature of obligations and as strengthening the claim put forward by the company, and which Her Majesty's Government consider to be well founded.'[2]

The United States Government, however, held to its view that the concessions in question were not binding as contracts, and were at the most 'equitable' claims on the ceded provinces.[3] The Foreign Office requested the view of the Law Officers on this distinction, and on 12 December 1900 they reported that they were unable to agree with the reasoning of the United States. They urged that the full claims of the respective companies should be recognized.[4]

There the matter, from a diplomatic point of view, rested. Subsequently, however, action was taken by the Eastern Extension Company before the United States Court of Claims for payment of subsidies contracted for under the concessions. This action was dismissed for want of jurisdiction,[5] and the company then brought an action on implied contract, which went on appeal to the Supreme Court.[6] As any claim based on state succession was barred for procedural reasons, the case proceeded on the assumption that an obligation to pay the subsidy could arise only by a contract, express or implied, made by the United States, or through unjust enrichment at the expense of the claimant. It was held that no contract 'was made by any officer of the United States',[1] and that the sending of telegrams at a special premium was alone insufficient to establish unjust enrichment.[2] Since the Court was unable to take cognizance of the effect of the change of sovereignty the case is unimportant in the law of state succession.

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[1] Opinion of 2 May 1899, ibid. (7356), No. 54.

[2] Moore, op. cit., vol. i, pp. 406–7.

[3] Sayre, loc. cit., p. 712.

[4] Opinion of 12 December 1900, F.O. *Confidential Papers* (7516), No. 45.

[5] 254 U.S. 325.

[6] 251 U.S. 355.

The Cuban Republic, which was established on 20 May 1902, was approached by the Cuba Telegraph Company for payment of subsidies which the Spanish Government had agreed to pay under the terms of the concession. The attitude of Cuba was that an engagement contracted with Spain remained the engagement of that country, and did not pass to the successor. This conclusion it justified on the doctrine propounded by the United States that concessions not exclusively for local benefit were not binding. The concession to the company was considered by the Cuban Government to have been granted as a 'measure of war' against the Cuban people. The company thereupon took action in the Supreme Court of Cuba, and judgment was given on 11 October 1906 upholding the view of the Government. When the British Government was asked to further the claims of the company diplomatically it agreed that the concession had prima facie passed to Cuba, but it reserved its opinion on the question of the concession being an 'act of war'. No further action was taken.

(v) *Annexation of the Boer Republics, 1900.* The attitude which Great Britain took towards concessions granted by the Boer Republics prior to their annexation in 1909 has been the occasion of considerable controversy. It has given substance to the 'negativist' doctrine, and as such is one of the most important precedents in the law of state succession. Criticism of the British treatment of these concessions has been intensified in more recent times,[3] and the question must now be reconsidered in the light of the Law Officers' Opinions which have recently become available.

The Orange Free State was annexed by Proclamation on 24 May 1900, and the South African Republic on 1 September 1900. The British High Commissioner announced by Notice that the British Government would consider all concessions on their merits.[4] The Colonial Office, before taking definite steps with respect to these concessions, considered an opinion submitted by the legal adviser to the High Commissioner. This opinion was to the effect that the British Government was 'justified in holding that all concessions granted by the annexed States had expired, and that the concessionaires had no legal claim which they could enforce against Her

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[1] 251 U.S. 355, at p. 366.

[2] 251 U.S. 355, at p. 363.

[3] Mosler, op. cit., p. 113; Drost in *Revue de droit international et de législation comparée*, Ser. 3, vol. 20 (1939), p. 701.

[4] *Parliamentary Papers*, 1901, vol. 35 (Cd. 623), p. 5.

Majesty's Government'. A complete refusal to be bound by the obligations of the annexed states 'was the stronger and more correct position to assume'. Expressing itself as not entirely convinced of the validity of this argument, the Colonial Office requested the advice of the Law Officers on the following questions: Whether the British Government was justified in holding that all concessions had lapsed and that the concessionaires had no legal claim which they could enforce against the Government; and whether the Government was free to determine what obligations they would take upon themselves.

'A Government annexing territory after conquest', the Law Officers reported, 'so annexes it subject, speaking generally, to such legal obligations as have been incurred by the previously existing Government before the outbreak of war, and not from their nature conditional on the continued existence of the territory as an independent State.' They did not agree with the legal adviser to the High Commissioner that 'it would be open to Her Majesty's Government, acting upon any recognized principle of international law, to repudiate responsibility for all the obligations incurred by the Governments of the South African Republic and the Orange Free State'. Within the term 'obligation' they specifically included concessionary contracts. They were careful to explain, however, that 'the duty to observe such contracts cannot be enforced in a municipal court; it rests merely on the recognition of international law of what is equitable upon the acquisition of property of the conquered State'. They were also of opinion that contracts incurred during the war, or in contemplation of the war, need not be recognized, making to this extent some concession to the American doctrine of 'odious' concessions.[1]

This opinion, which was adhered to consistently by the Law Officers despite the policy subsequently adopted by the Government, robs the Report of the Transvaal Concessions Commission of some of its authority. This Commission, which was set up in August 1900, was required to examine the merits of the concessions granted by the Boer Governments, and to advise the Colonial Office whether or not they should be maintained. Its Report, which was published on 19 April 1901,[2] made recommendations in respect of twenty-five concessions, and these recommendations were prefaced by some general observations on the law of state succession.

An annexing state, it was argued, is not legally bound by contracts made with the annexed state, and no court of law has authority to enforce them.

> 'After annexation, it has been said, the people change their allegiance, but their relations to each other and their rights of property remain undisturbed; and property

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[1] Opinion of 30 November 1900, F.O. *Confidential Papers* (7516), No. 22A.

[2] *Parliamentary Papers*, 1901, vol. 35 (Cd. 623).

includes rights which lie in contract. . . . Concessions of the nature of those which are the subject of enquiry present examples of mixed public and private rights;[1] they probably continue to exist after annexation until abrogated by the annexing State, and, as a matter of practice in modern times, where treaties have been made on cession of territory, have often been maintained by agreement.'

Nevertheless, the Report went on to deny that international law places any responsibility on the successor state with respect to such rights. 'We doubt whether the duties of an annexing State towards those claiming under such concessions or contracts granted or made by the annexed State have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice, as to warrant their being termed rules of international law.' Despite this denial, however, the Report concluded that 'we are convinced that the best modern opinion favours the view that, as a general rule, the obligations of the annexed State towards private persons should be respected'. This general rule the Report considered to be a rule of 'ethics rather than of law'.[2] In making this distinction between law and ethics the Report betrayed, as has often been pointed out, too great an adherence to the Austinian conception of law.[3] It was a distinction unsupported by arguments of law or discussions of precedents, and it ignored not only the practice of Great Britain and other states during the previous century, but even the contemporary practice of the former with respect to the Madagascar and Spanish Concessions. Its view of sovereignty led the Commission to assume that a successor state takes the rights but not the liabilities of a contract. This was the thesis subsequently to be propounded by Professor Keith, and it was the *dictum* of the Transvaal Supreme Court at about the same time, when it was said that 'the conqueror becomes, by right of conquest, the successor to all the property, corporeal and incorporeal of the vanquished', and hence to its rights under contract.[4]

To the general equitable principle that concessions should be respected the Commission attached certain conditions. The contract must have been valid under the laws of the annexed state and not *ultra vires* the authorities who granted it; it must also have been duly and bona fide acquired. On this ground the Report recommended the cancellation of a concession which had been obtained by bribery. The contract must not have been in breach of a treaty with the annexing state; it must not be injurious to the latter;

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[1] If the Commission intended by this reference to mixed public and private rights to allege that such rights fail precisely because of their public character, its argument is repudiated by the decision of the Permanent Court in the *German Settlers* case, where rights of a distinctly public and imperialistic character were upheld (see *supra*).

[2] Loc. cit., p. 7.

[3] Westlake in the *Law Quarterly Review*, 17 (1901), p. 395; Kaeckenbeeck in *Recueil des cours de l'Académie de droit international*, 59 (1937), p. 350.

[4] *Postmaster General* v. *Taute*, Trans. L.R. (Sup. Ct.), 1905, 582.

and it must not have been revocable. On this last ground the Report advised against recognition of concessions which had depended on the discretion of the South African Government.[1]

The procedure adopted by the Commission was no less objectionable than its law. It followed the precedent of the French Government in the case of the Madagascar concessions, and that of the Fiji Land Commission, in shifting the *onus probandi* on to the concession-holders, who were required to establish that the above conditions were fulfilled in their cases.[2]

Most of the concessions which the Report analysed were upheld. The most significant case in which a recommendation was made that the concession be cancelled was that of the Netherlands South African Railway Company. This company had made its facilities available to the Boer Governments during the war, and in this manner had undoubtedly made its contribution to the prolongation of hostilities. Because the company had thus identified itself with the enemy it was considered inappropriate that its concession be continued, and this decision was justified by the importation of the doctrine of 'unneutral service'.[3] 'We have seen', it was said, 'that the operations of the company during the war were acts of aggression, redress for which, as it cannot be sought against the persons, may justly be exacted against the property of the aggressor.' This application to the case of a railway of laws which had hitherto been restricted to ships of neutral nations was a novelty which has found sanction in no other instance.

Shareholders of the company were not compensated because it was argued that they were the proprietors, they elected the directors, and they attended meetings.[4] 'Nothing, however, disentitles the bondholders from full recognition,' because these had lent money bona fide and had no control over the activities of the company.[5] The decision in this instance was also bolstered up by the contention that the company was a monopoly against the public interest. 'We entertain no doubt that, even were not a monopoly of this nature and character injurious, in whosoever's hands, to the public interest, yet, in any case, this monopoly held by this foreign company is injurious.'[1]

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[1] Loc. cit., p. 8. In this it followed *Cook* v. *Sprigg*, [1899] A.C. 572, which arose out of the refusal of the British Government to recognize a concession granted by a Swaziland chief prior to the annexation of his territory, not because the concession was never valid, but because even a valid concession could have been revoked at any time by the chief, who was not subject to any law, and was a mere despot.

[2] 'In each case we held that the onus of proof was upon the concessionaire to establish the validity of his concession' (p. 8). The Fiji Land Commission was set up after the British annexation of Fiji in 1874 for the purpose of determining the validity of land claims in the islands. It adopted the procedure of requiring claimants to prove that their rights were properly acquired, and such procedure was objected to by the German and United States Governments on behalf of nationals whose claims were rejected (*Parliamentary Papers*, 1883, vol. 46 (C. 3815), p. 2).

[3] Professor Gidel regards the distinction drawn between 'normal' and 'abnormal' operations as fictitious. He asks if any railway which transports troops or munitions is guilty of an act of war, and holds that the principle is the thin end of the wedge to destroy respect for acquired rights (op. cit., p. 196). It is impossible, he says, to invoke the idea of neutrality when the railway could be requisitioned by the government (ibid., p. 199). See also Mosler, who rejects the Commission's argument as untenable (op. cit., p. 170).

[4] Loc. cit., p. 36.

[5] Ibid., p. 37.

Other concessions were cancelled on similar grounds, notably that of the Johannesburg and Zuirbekom Water Supply Concession, whose monopoly gave it a complete discretion in the matter of supplying water to Johannesburg. There is, however, no authority elsewhere for the contention that a concession may be cancelled without compensation merely on the ground that it is a monopoly. There is little doubt that the question of monopolies figured largely in the considerations of the Commission, since English lawyers tend to view with distaste the idea of a private monopoly of public utilities.[2]

If the Report was opposed to the opinions of the Law Officers, it was similarly opposed to the opinions of other states who were interested in the matter. Even before the Report had been filed, the German and Austrian Embassies in London had made representations on behalf of national shareholders of the Netherlands South African Railway Company, and during the subsequent three years repeated diplomatic steps were taken. Germany in particular was insistent that a legal obligation to respect the company's concession had been incurred by Great Britain.[3] The company itself took legal opinion, which contended that Great Britain had succeeded to all contractual obligations of the late Republics, and asserted that private property rights, including concessions, were protected by international law.[4] Fortified with this opinion the company, which was incorporated in Holland, invoked the assistance of the Dutch Government. The latter embarked on a long and fruitless correspondence with Great Britain, and eventually suggested arbitration.[5] This Great Britain refused, but after protracted negotiations settled most of the outstanding claims with *ex gratia* compensation, though still with a denial of legal liability.[6]

In the meantime, some appearance of authority for the views of the Commission had been given in the *dictum* in the case of the *West Rand Central Gold Mining Company* v. *The King*, in which it was said that a conqueror is at liberty to fix the financial conditions on which it desires to acquire the conquered country. As was the case with the Report itself, this conclusion was arrived at without adequate analysis of precedents or discussion of theory, and in consequence is of little value.[1]

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[1] Loc. cit., p. 34.

[2] The United States Attorney-General was of opinion that 'the mere fact that the Western Union Telegraph Company is enjoying under a grant of exclusive right what amounts to a monopoly is no reason of itself why it should be deprived of its concession. It is easy to say that monopolies are odious, but there are concessions which amount to monopolies which are lawful and cannot be disturbed except by a violation of public faith. Concessions of this kind, which carry with them exclusive rights for a period of years, constitute property of which the concessionary can no more be deprived arbitrarily of its personal assets' (*Opinions of the Attorneys-General of the United States*, vol. 22, pp. 516–18). See on the question Fuller in *Columbia Law Review*, 3 (1903), p. 245.

[3] Mosler, op. cit., p. 134.

[4] Gidel, op. cit., p. 9.

[5] Feilchenfeld, *Public Debts and State Succession* (1931), p. 383.

[6] Pitt Cobbett, *Cases on International Law* (4th ed., 1937), vol. i, p. 354.

The British Government would appear to have been fully aware that its policy towards the Transvaal Concessions was inconsistent with that which it adopted at the same time towards the Spanish Concessions in Cuba and the Philippines. On 23 October 1900 the Foreign Office asked the Law Officers 'whether it is necessary or desirable, in view of the attitude which has been taken up by Her Majesty's Government in regard to the Concessions granted by the South African Republic, that Her Majesty's Ambassador at Washington should be instructed to advance any further arguments in reply to the opinions of the United States' Attorney-General'. To this inquiry the Law Officers replied that they did not think that this attitude formed 'any obstacle to pressing the claims' on the United States Government.[2]

The Foreign Office, however, still experienced qualms of conscience, and observed a month later that 'it is thought that the attitude already adopted . . . in somewhat analogous circumstances towards the holders of Concessions in South Africa may afford an important indication of the limits within which the claims of British concessionaires in Cuba or Manila may consistently and properly be pressed on the attitude of the United States' Government'. This doubt would appear to have made little impression on the Law Officers, who merely referred to their previous opinion.[3] Neither Great Britain nor the United States established in the two controversies any conclusive authority for a denial of rules of international law. Subsequent practice tends to uphold such rules.[4]

(vi) *Annexation of Korea by Japan, 1910.* When Japan annexed Korea in 1910 it was announced that foreigners resident in Korea would, so far as conditions permitted, enjoy the same rights and immunities as in Japan proper, and the protection of their legally acquired rights. The British Foreign Secretary was disturbed as to the effect of this pronouncement upon British mining concessions and property rights in general, because the privileges enjoyed by British subjects in Korea were materially greater than those accorded them in Japan. 'It would seem fair', he wrote to the Japanese Ambassador, 'that the former should not be placed in a less favourable position in consequence of the annexation.'[1] The British Ambassador in Tokyo, acting on instructions from the Foreign Secretary, took up the matter with the Japanese Foreign Minister, and on 21 July 1910 reported that the latter had informed him that 'all commercial, industrial and property rights, mining and land ownership, foreign settlements and perpetual leases would not immediately be disturbed by annexation, but would form subject for later discussion with powers'.[2]

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[1] [1905] 2 K.B. 391, at p. 402.

[2] Opinion of 30 November 1900, F.O. *Confidential Papers* (7516), No. 44.

[3] Opinion of 12 December 1900, ibid., No. 45. It is interesting to observe that the same Law Officers, R. B. Finlay and E. Carson, as counsel in the *West Rand* case argued there that 'there is no principle of International Law by which a conquering State becomes *ipso facto* liable to discharge all the contractual obligations of the conquered states' ([1905] 2 K.B. at p. 394). The subsequent opinion of the Law Officers has been that the Commission did not put forward legal principles, but only suggestions as to the manner in which the discretion of the Government should be exercised.

[4] A Swiss court in 1905 upheld a concession concerning water rights in territory transferred from one canton to another (*In re Potters' Works of Ziegler Brothers*, reported in *American Journal of International Law*, 1 (1907), p. 237).

In a subsequent conference with the Foreign Minister, the Ambassador pointed out that 'it is very important that British Subjects in Corea should know what would be the fate of the commercial, industrial and property rights which they had acquired in Corea in the matter of mines, missions and land ownership in general'. The Japanese Minister assured him that 'no change would be made at the time of annexation, but the Japanese Government would wish that all these points should be subsequently discussed with the foreign government concerned'.[3] Shortly afterwards the Japanese Government delivered a Note to Great Britain in which it was stated that they fully recognized British land and mining interests in Korea, and that all the terms of the concessions were confirmed and all rights and privileges thereby granted would be duly maintained and respected.[4]

It must be admitted that there is little in this correspondence to substantiate the recognition of a rule of law. In fact, the Foreign Secretary's reference to it seeming 'fair' would appear to be an echo of the 'ethics rather than law' doctrine of the Transvaal Concessions Commission. The instance is valuable, however, as evidence of the tendency in modern practice to confirm concessionary and other private rights in absorbed territory.

(vii) *General Practice, 1911–20*. The Committee of Experts which sat in Paris in 1913 to draft the terms of settlement of the First Balkan War adopted a formula that 'cessionary States are subrogated in all the rights and charges of the Imperial Ottoman Government in what concerns concessions having their exploitation on the territories ceded by the present treaty; they equally engage to respect and execute contracts in these territories validly entered into by the Imperial Government or competent authorities'.[5] Under the Treaty of Constantinople Bulgaria assumed the rights and obligations of Turkey in respect of concessions of the Oriental Railway Company in the territories ceded to her.[1]

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[1] *Parliamentary Papers*, 1911, vol. 103 (Cd. 5717).

[2] F.O. 371/877.26451/988/10/12, *British Documents on the Origins of the War, 1898–1914*, edited by Gooch and Temperley, vol. viii (1932), p. 493.

[3] F.O. 371/878.28688/988/10/12, ibid., p. 494.

[4] *Parliamentary Papers*, 1911, vol. 103 (Cd. 5717).

[5] F.O. 4328/1/13/44, Gooch and Temperley, op. cit., vol. ix (1933), Pt. II, p. 455. Austria proposed an amendment specifically to include railway concessions (F.O. 4786/1/13/44, ibid., p. 455). The British view was that the matter should be settled in a manner 'equitable to Turkey' (F.O. 8858/5729/13/44, ibid., p. 517).

Notes were exchanged between Italy and Turkey in 1923 in which the former agreed to maintain concessions in territories ceded to her in 1911. She was nevertheless accorded the power to bring such concessions 'into conformity with the new economic conditions'.[2] In the Treaty of Rapallo of 1920 Yugoslavia declared her recognition of the concessions in Dalmatia of an economic character granted to Italian citizens by the Austrian administration.[3]

(viii) *Dissolution of the Ottoman Empire, 1923.* Some difficulty was experienced in regulating the numerous concessions which had been granted by the Ottoman Government in territories which at the end of the First World War were ceded to the Allied and Associated Powers as mandates or otherwise. There would seem to have been no question that the concessions were, as a general principle, to be maintained, but problems arose with their adaptation to quite different economic circumstances.

As early as 17 March 1920 the Acting Secretary of State of the United States wrote to the American Chargé d'Affaires in London explaining the policy of the United States with respect to American concessions in these territories. The State Department, he said, 'had examined Standard Oil Company permits and concessions in Palestine, and finds (1) that in respect of all its claims it has certain vested rights under Turkish law; (2) that Great Britain in its temporary occupation of Palestine may legally enjoin the acquisition of further vested rights but must by virtue of its position as quasi-trustee recognize and protect the vested rights of the Standard Oil Company already existing; and (3) Great Britain as trustee cannot legally allow discrimination in favour of her own and other nationals'.[4] On 3 April 1922 he wrote to the Ambassador in London with regard to other American concessions in Palestine. 'It is also to be understood, of course,' he stated, 'that the existing legal rights of American citizens or companies in Palestine are to be fully respected and safeguarded.'[5]

Protocol XII annexed to the Treaty of Lausanne dealt with the question of these concessions.[6] All those entered into before 29 October 1914 between the Ottoman Government or any local authority and nationals of the contracting parties were to be maintained.[7] In addition, the successor states were to be fully 'subrogated' as regards the rights and obligations of Turkey towards the nationals of other states.[1] Provision was made for the 'readaptation of concessions' to the new economic circumstances.[2] Concessions which were still executory might be dissolved 'at the request of the concessionaire', subject to indemnification for expenses incurred.[3]

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[1] *British and Foreign State Papers*, vol. 107, Pt. I, p. 706.

[2] *League of Nations Treaty Series*, vol. 36, p. 921.

[3] Ibid., vol. 18 (1923), p. 396, Art. 7 at p. 403.

[4] *Foreign Relations of the United States*, 1920, vol. ii, p. 650. See also ibid., 1923, vol. ii, p. 1033.

[5] Ibid., 1922, vol. ii, p. 273.

[6] *British Treaty Series*, 1923, No. 16 (Cmd. 1929).

[7] Art. 1.

This Protocol gave rise to the *Mavrommatis* case, a claim instituted by the Greek Government before the Permanent Court of International Justice on behalf of a national, who alleged that the British Government, as mandatory of Palestine, was obliged to respect his concessions.[4] Mavrommatis had been the holder of two concessions to undertake public works, known respectively as the Jerusalem and Jaffa Concessions. With respect to the latter the Court decided that for technical reasons it had no jurisdiction, but in arriving at this conclusion it observed that 'if Protocol XII leaves intact the general principle of subrogation. . . . The Administration of Palestine would be bound to recognize the Jaffa Concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of International Law to the application of which the obligations entered into by the Mandatory created no exception.'[5]

The claim in respect of the Jerusalem concessions was the only one considered on its merits. The Greek Government alleged that the concession had begun to be put into operation and that therefore the Mandatory was bound to maintain it and to agree to its 'adaptation to the new economic conditions of the country, or to redeem it by paying to the claimant reasonable compensation'. It was alleged that a concession had been granted to a third party which rendered impossible the fulfilment of the obligations owed to Mavrommatis, and that therefore compensation must be paid.[6] The Court refused to entertain the claimant's plea that the provisions of Protocol XII should be supplemented by 'principles taken from general International Law' because the Protocol was complete in itself.[7]

It was held that the grant of the competitive concession had not rendered the fulfilment of that of Mavrommatis impossible.[8] As the case was decided entirely on the provisions of the Protocol it is no authority for general international law, and the only *dictum* which makes reference to general international law is that quoted in respect of the Jaffa Concession. The Greek Government's pleading, however, clearly indicates a reliance not only on the Protocol, but also on the 'general principles of international law'. In its Memorial it stated that 'it is indeed established in International Law that all rights validly acquired by individuals in a given territory preserve their force and value despite of any change of sovereignty which has come over this territory. The new sovereign is, on the same ground as the previous ones, bound to respect them, or, if need be, to have them respected.'[1]

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[1] Art. 9.

[2] Art. 5.

[3] Art. 6.

[4] *Mavrommatis Concessions* case, *Publications of the Court*, Ser. A, No. 5.

[5] Ibid., No. 2, p. 28.

[6] Ibid., p. 8.

[7] Ibid., No. 5, p. 27.

[8] Ibid., p. 45.

At various times during the administration of the Mandate Great Britain had to decide whether or not to maintain concessions held by her own subjects, and therefore not within the scope of the Protocol. One such concession, claimed by a Captain Bennett, was rejected, and the Report of the Transvaal Concessions Commission was invoked to justify the conclusion that 'international law is not sufficiently settled on the point'. A claim by a Mr. Edwards and a Major Henry to salt concessions on the Dead Sea was likewise rejected on the ground that 'a succeeding Government, in the absence of express stipulations, has it in its discretion whether to recognize or not to recognize concessionary contracts entered into by the preceding Government'. Concessions not protected by treaty provisions, the British Government considered, were not maintained by principles of international law. Hence, the right was asserted to abrogate concessions granted by Germany in Tanganyika, where the only concessions actually recognized were those on which a considerable amount of work had been done. These decisions of the British Government, being based on the *dicta* of the Transvaal Concessions Commission, and hence on what has been alleged here to be a mistaken view of the law, do not, it is submitted, carry great weight as precedents. They were clearly prompted by the distinction that concessions are contracts pure and simple, and subject to different rules from land tenure. This distinction led the Government to the conclusion that a concession granted by Turkey to the Baghdad Railway Company was not binding as a contract on the British Government, but was a 'property right' within the definition of Article 65 of the Treaty of Lausanne. The right to run trains on the line was regarded, not as a contractual right, but as a justified user of realty.

(ix) *The Sopron Köszeg Local Railway Company Arbitration, 1929.* Rules of international law were recognized by the arbitrators appointed to give a decision on the readaptation of the concession of the Sopron Köszeg Local Railway Company in Austria and Hungary. Article 330 of the Treaty of St. Germain and Article 304 of the Treaty of Trianon had enacted that the administrative and technical reorganization of railway lines which were situated in the territories of several successor states would be effected by agreement between the companies and the states concerned. In the absence of such agreement, the matter was to be referred to arbitration. In the case of the Sopron Köszeg railway, which ran partly through Austria and partly through Hungary, negotiations with the Austrian Government led to a controversy, and arbitrators were appointed under the terms of the treaty to determine the basis of agreement. They prefaced their decision on the details of the reorganization of the railway by some general remarks on the position of a concession in ceded territory. Assuming that Austria was a sovereign person, they stated:

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[1] *Mavrommatis Concessions* case, *Publications of the Court*, Ser. C, No. 5, p. 105.

> 'In principle the rights which a private company derives from a deed of concession cannot be nullified or affected by the mere fact of a change in the nationality of the territory on which the public service conceded is operated. . . . Most authorities and international judgments which conform most nearly to modern views of international law take this view. . . . The contract clauses under which the Sopron Köszeg Local Railway Company was working before the war can be pronounced neither wholly invalidated by the change of sovereignty affecting the territories on which its undertaking is situated, nor indeed wholly valid and enforceable according to their drafting and tenor up to the expiration of the concession; that the arbitrators appointed by the Council of the League of Nations are called upon . . . to make such changes in the position under the contracts as are rendered necessary by the events of the last fifteen years, which could not be anticipated in the joint intentions of the Parties when the concession was granted; that the arbitrators should with that end in view, take account both of the legitimate interests involved in the public utility undertaking concerned, and of the purpose set before them by the Treaties of Peace, which is to restore the regular operation of the railways of the former Austro-Hungarian Monarchy, in the higher interests of the facility and freedom of international communication.'[1]

The case is important for its clear exposition of the issue which is presented to a successor state. It recognized that a successor state must take account of 'the legitimate interests involved' in the undertaking. It also recognized that such a state cannot be obliged by every term of the concession, and must have the competence to 'make such changes in the position under the contracts' as are rendered necessary by the change.

(x) *Annexation of Ethiopia, 1935.* On 20 December 1925 Notes were exchanged between Great Britain and Italy relating to a British concession to build a dam on Lake Tsana in Ethiopia. On 3 April 1936, after the annexation of that country, Italy guaranteed the continuation of British rights, and this guarantee was repeated in the Anglo-Italian Agreement of April 1938.[2] Nevertheless, the Italian Government did not consider itself under any legal obligation to recognize concessions in Ethiopia because, it was argued, principles of international law could not apply to the conquest of an undeveloped country.[3] The effect of this attitude upon the concession of the Djibuti–Addis Ababa Railway Company, a French corporation, was considered in the French National Assembly. M. Laval stated that the French Government was not interested in Italy's actions so long as she respected acquired rights.[1] An agreement was entered into between the two countries confirming this concession in most particulars.

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[1] *Annual Digest*, 1929–30, Case No. 34.

[2] Royal Institute of International Affairs, *Documents on International Affairs*, 1938 (1943), vol. ii, p. 472.

[3] Mosler, op. cit., p. 107. In this instance Italy appears to have followed the French view with respect to the Madagascar Concessions. In a *Decreto-Legge* of 9 May 1935 there was no mention of Ethiopia as a country, but only of 'the tribes'. The opponents of state succession in Italy argued that monopolies had been granted by Ethiopia because she was unable to exploit her own resources (ibid., p. 185).

(xi) *General practice since the Second World War.* The Peace Treaty with Italy of 1947 provided that Albania and Ethiopia might cancel within one year concessions or special rights granted to Italian nationals.[2] This seems to be a derogation from a general principle, and it would seem to imply that concessions not cancelled within the year, and concessions to others than Italians, were to be maintained. In the Treaty of Recognition of Transjordan it was agreed that commercial concessions granted in respect of Transjordan territory prior to the signature of the Treaty should be valid for the periods specified in their texts.[3] After much negotiation at the Round Table Conference held at The Hague, a similar enactment was incorporated in the agreement arrived at between the Netherlands and Indonesia on 2 November 1949, respecting outstanding rights and liabilities. The latter undertook to 'adhere to the basic principle of recognizing' concessions, and would restore the title-holders to the actual exercise of their rights.[4]

The maintenance of concessions in Israel was originally provided for in a declaration contained in the Resolution of the General Assembly of the United Nations of 29 November 1947.[5] As, however, this agreement was never implemented, the question of economic concessions was left to be determined, if at all, by international law. In the negotiations which took place at Tel Aviv in July 1949 the British representatives were insistent that 'according to the principles of international law private property must be respected by the successor Government, and concessions must be maintained'. These concessions were, however, in a rather unusual situation since, consequent upon the decision in the *Mavrommatis* case, and in exercise of the powers granted by the Protocol to the Treaty of Lausanne, Great Britain, as Mandatory of Palestine, had regulated their exercise by municipal Ordinance.[6] Such acts of legislation were undoubtedly continued in force after the setting up of the State of Israel by Act of the Knesseth maintaining the law of Palestine as it existed on 14 May 1948.[7] At the present time these concessions are being 'readapted to the new economic circumstances' in accordance with the powers contained in the Palestine Ordinances.

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[1] *Revue de droit international et de législation comparée*, 3rd ser., 9 (1936), p. 583.

[2] *British Treaty Series*, 1948, No. 50 (Cmd. 7481), Arts. 30 and 36.

[3] Ibid., 1946, No. 32 (Cmd. 6916), Art. 10.

[4] *Staatsblad*, 21 December 1949.

[5] United Nations Doc. A/516, resolving to adopt the report of the *ad hoc* committee contained in A/AC. 14/34.

[6] See, e.g., The Electricity Concession Ordinance (Drayton, *Law of Palestine*, vol. i, p. 633); The Electricity Concessions Jerusalem Ordinance (ibid., p. 658); The Dead Sea Concessions Ordinance, No. 3 of 1937 (*Palestine Gazette Supplement*, No. 1 of August 1937, p. 195).

[7] Transition (Temporary Provisions) (No. 2) (Amendment Law), Art. 11, Statute Book 14 of the 23rd day of Tamuz, 5709, p. 72.

IV. *Expropriation of concessions and the principles of compensation*

The generally consistent practice which has just been analysed is clearly based on the principle that the acquired rights of a concessionaire must be respected by a successor state.[1] The only occasion on which such a duty was categorically denied was the attitude of Great Britain with respect to the Transvaal and Ottoman Concessions. An attempt has been made here to demonstrate that the attitude adopted on that occasion was not only based on a mistaken view of the law and problems involved, but was inconsistent with that of Great Britain on other occasions. The United States, France, and Italy did not deny the existence of the general principle, but sought only to establish in the particular cases in which they were concerned exceptions to it.

It is not immediately clear, however, in what exactly the duty of the successor state consists. If it were subrogated *ipso jure* in the contract of concession, or obliged to subrogate itself, it would, of course, be bound by all the terms of the concession, and would have no discretion either to cancel or modify it without the consent of the concessionaire.[2] Such subrogation has been insisted upon in much of the diplomatic correspondence which has just been considered.[3] However, it cannot be admitted that international law recognizes so stringent a rule. Not only is subrogation not demanded by the doctrine of acquired rights, but the arguments against it are considerable. In the first place subrogation could come about only by devolution of the contract of concession. Such devolution is dependent on the acknowledgement in international law of the doctrine of universal succession, a doctrine now everywhere rejected. As was explained earlier, the contract terminates with the change of sovereignty. This conclusion was arrived at by the Attorney-General of the United States in his opinion relating to the Manila Railway Company's concession. 'All the promises of every contract', he advised, 'entered into by the former government of a province wrested from it by victory in war do not transfer themselves to the new Government in defiance of the natural proposition that a man cannot be bound by a stranger's promise.'[1]

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[1] In the view of Dr. Kaeckenbeeck 'there is no doubt that modern juristic opinion is entirely in favour of the obligation to respect concessions' (*Recueil des cours de l'Académie de droit international*, 59 (1937), p. 348). Dr. Mosler maintains that 'respect for concessionary rights has its root in the respect for acquired rights' (op. cit., p. 92). Elsewhere he says that concessions are protected because they belong to the category of private rights and are subject to the principle that change of sovereignty shall affect the rights of individuals as little as possible' (ibid., p. 132).

[2] Earlier writers upheld subrogation with some unanimity: Fiore, *Nouveau Droit international* (2nd ed. 1885), vol. i, p. 315; Martens, *Traité de droit international*, translated from the Russian by Leo (1883), vol. i, p. 368; Westlake, *International Law* (1904), vol. i, p. 75.

[3] The opinion of the Law Officers relating to the Nitrate Railway Company concession of 10 February 1890 was based on the argument that the company's monopoly could not be infringed. That of 30 November 1900 respecting the Transvaal concessions seems to be in favour of subrogation of the successor state in the 'legal obligations' of its predecessor. That the Law Officers were not in favour of universal subrogation is clear from the exception they made in the case of concessions granted during the war. The formula adopted at the Conference of Paris prior to the Treaty of Constantinople employed the term 'subrogation'. The judgment in the *Mavrommatis* case speaks of the 'general principle of subrogation' as one of international law 'to the application of which the obligations entered into by the Mandatory created no exception'.

During the past century the prevailing concept of the sanctity of private property led to the assumption that a successor state could not interfere with such property in areas transferred to it or annexed by it. This assumption was supported by the long line of American decisions which established that private property in the regions incorporated into the United States had not been abrogated by the act of incorporation, and were after the act protected by the provision of the Constitution relating to property rights.[2] More recently, however, the tendency towards nationalization of certain basic industries in some countries, and of all forms of property in others, has compelled the abandonment of any such assumption.[3] It is now recognized that a sovereign state has the competence in international law to expropriate rights possessed by foreigners in its territory.[4] There is no reason why a successor state should be in any less strong a position in this respect than any other, or why acquired rights should be invested after a change of sovereignty with a 'sanctity and permanence'[5] greater than they had before.

A successor state cannot be compelled to carry on with arrangements made by its predecessor which are either contrary to its public interests or obstructive of the realization of its own ideas of social development.[6]

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[1] *Opinions of the Attorneys-General of the United States*, vol. 21, p. 180. Elsewhere he said: 'The concessions here in question are executory contracts, not concerning the public domain owned by Spain, but containing many personal obligations of Spain and other parties. Spain is regarded by the law of nations as having a personality of her own distinct from that of the power which has succeeded her in control of the ceded territory, and I am not aware of any authority for saying that such personal obligations either on the part of the Government of Spain or the other contracting parties, become legally binding upon a Government which has made no such promises' (Moore, op. cit., vol. i, p. 401. See also Keith, op. cit., p. 6). From a legal point of view, says Dr. Mosler, the contract does not continue to exist, but there is a new legal relationship which is based on the obligation which the acquiring state has under international law with respect to the home state of the concessionaire (op. cit., p. 92). It is preferable, however, to base the relationship on the obligation owed not to the home state, but to the individual directly. Professor Hyde appears to think that the contract continues until cancelled, but this can only mean the interest which the concessionaire has in the factual situation which the contract has brought into being (*International Law Chiefly as Interpreted and Applied by the United States*, vol. i (1945), p. 428).

[2] See *supra*.

[3] Dupuis in *Recueil des cours de l'Académie de droit international*, 32 (1930), p. 162; Dunn in *Columbia Law Review*, 28 (1928), p. 177; Kaeckenbeeck in this *Year Book*, 17 (1935), p. 15.

[4] Bullington in *American Journal of International Law*, 21 (1927), p. 702; Dunn, loc. cit., p. 180; Herz in ibid., 21 (1927), p. 525; *Standard Oil Tankers* case, ibid., 22 (1928), p. 404.

[5] Kaeckenbeeck in *Recueil des cours de l'Académie de droit international*, 59 (1937), p. 355.

[6] Mosler, op. cit., p. 94; Gidel, op. cit., p. 208. In *Niederstrasser* v. *Polish State*, the Upper Silesian Arbitral Tribunal stated that 'the successor state may, like the ceding state, take away or modify these rights by way of legislative action' (*Annual Digest*, 1931–2, Case No. 33).

Change of sovereignty often involves changes in the social and economic structure of the community, and a successor state must focus the principle of respect for acquired rights against the demands made by these changes. Italy, for example, was acknowledged to have the right to bring concessions granted by Turkey in Libya 'into conformity with the new economic conditions'. Protocol XII to the Treaty of Lausanne, despite the fact that it speaks of 'subrogation', recognized the necessity for the 'readaptation of concessions'. The Sopron Köszeg Railway arbitration accepted the general principle that rights to which the concession gave rise could not be nullified, but qualified it by stating that the terms of the concession, 'according to their drafting and tenor', could not be considered as wholly 'valid and enforceable'. While the 'legitimate interests involved' demanded recognition, it was considered that they were subject to 'such changes' as were 'rendered necessary by the new circumstances'. In the agreement between the Netherlands and Indonesia, by which the problems resulting from the independence of the latter were resolved, it was specifically agreed that the successor state had a complete discretion with respect to 'fiscal measures and social and other measures customary in a modern country'. Had Great Britain been subrogated in the duties of the Transvaal concessions, she would have had to maintain the Johannesburg Water Supply Concession, a monopoly which left that city in the power of a group of private individuals. It cannot be pretended that any state would ever consent to this situation, and even Westlake, who was uncompromisingly opposed to the principles of the Transvaal Report, agreed that Great Britain was justified in 'claiming the right to decline to recognize or modify any concession . . . which may appear to prejudicially affect the interests of the public'.[1]

Until a successor state legislates to terminate acquired rights, however, these remain in existence as facts. Legislation to abrogate them must therefore be specific and express, and a judge must interpret it strictly so as to maintain in being acquired rights which are not unequivocally destroyed.[2] The principle of acquired rights in international law is no more than a principle that change of sovereignty should not touch the interests of individuals more than is necessary. This does not mean that these interests may not be interfered with at all. The doctrine merely indemnifies the title-holders from complete and arbitrary destruction of their interests, and secures for them an impartiality on the part of the successor state in the exercise of its discretion.[3] There can be no general immunity from expropriating legislation, and in this respect concessions are no different from other categories of acquired rights.[1] The successor state is not subrogated in the contract, and the interest which the concessionaire retains in his investment after the change of sovereignty is, so far as the state is concerned, a mere fact which can at any time be terminated.

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[1] *Law Quarterly Review*, 17 (1901), p. 337.

[2] Dr. Kaeckenbeeck calls this the principle of 'non-retroactivity', which binds the judge of the successor state as a rule of interpretation (this *Year Book*, 17, 1 (1936), p. 13; *Recueil des cours de l'Académie de droit international*, 59 (1937), p. 355).

[3] In the American case of *Chicago Railway Company* v. *McGlinn* it was said that 'after annexa-

Such expropriation, however, is only justified when accompanied by a recognition of the equities involved. The situation in which the concessionaire is interested may be more or less complex. He may have undertaken work, expended capital, bound himself by sub-contracts to third parties, and committed himself to extensive operations upon the assumption of deriving therefrom at a later date adequate remuneration. For the successor state to ignore this expenditure of capital and labour, and to appropriate to itself the benefits accruing therefrom, is unjustifiably to enrich itself. The concessionaire's equitable interest is an acquired right constituted by his activity, and international law imposes on the successor state a correlative duty to make restitution to the extent of its enrichment. So long as it satisfies the equities, it is immaterial whether the successor state modifies the concession, grants alternative facilities, or expropriates outright. Its obligation may be satisfied if it subrogates itself in the rights and duties of the original contract, and permits the concessionaire to continue with his operations. Such subrogation is effected by a new agreement, or novation of the contract, whether it be tacit or express. On the other hand, the minimum which international law demands is the payment of reasonable compensation.[2] Even the Transvaal Concessions Com-

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tion the new sovereign may apply its law to alter rights, but not arbitrarily and only in accordance with its own law' (114 U.S. 542, at p. 546). The Roumanian-Hungarian Mixed Arbitral Tribunal considered as a violation of the principle of respect for acquired rights and as an overstepping of the limits of international law the taking away of the property of an ex-enemy only 'in its entirety' (*Kulin, Emeric* v. *Roumanian State*, loc. cit.). See Verdross in *Recueil des cours de l'Académie de droit international*, 37 (1931), p. 358. It is not sufficient, however, to argue that the doctrine of acquired rights merely ensures equality of treatment for aliens and nationals alike. There must also be a minimum standard guaranteed by international law which applies to them equally (Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 504).

[1] Ibid., p. 502; Dupuis, loc. cit., p. 163. There is no evidence, says Professor Hyde, of a practice which denounces as illegal the efforts of a successor state to decline to continue the contract. Even where the contract is not detrimental to it the successor state is entitled to 'rid itself of the burdens of the arrangement on what may be regarded as an equitable, although not strictly contractual basis' (op. cit., p. 426).

[2] 'The minimum is that compensation must be paid,' says Dr. Mosler, op. cit., p. 37. See also p. 161, and Szaszy in *Revue de droit international*, 5 (1930), p. 592. Dr. Mosler's view of sovereignty leads him here to a conclusion which is perhaps open to question. He admits that the successor state has a discretion as to whether it will subrogate itself in the contract, but he holds that if it does so subrogate itself the consent of the concessionaire to the novation is not required. 'The legal relationship between it [the successor state] and the concessionaire is created once again with the same contents it had under the losing state', and this by a unilateral act of the acquiring state (op. cit., p. 91). However, it may be difficult to see how a new legal relationship is created without the participation of the concessionaire. If it is admitted that the contract of concession has expired with the change of sovereignty, then it would seem that the agreement of both the concessionaire and the new party is necessary for the novation. This agreement may

mission, although denying any legal obligation in the matter, admitted that 'the question of compensation arises, inasmuch as it would be inequitable that a concessionaire should lose without compensation a right duly acquired, and whose conditions have been duly fulfilled, because the new Government differed from the old in its view as to what was, or was not, injurious to public interest, even though the opinion of the new Government was obviously the true one'.[1]

The question of the Ottoman Concessions in the mandated territories was first disposed of in the Treaty of Sèvres, which was never ratified and was replaced by the Treaty of Lausanne. In this treaty the principles suggested above find clear expression. Concessions were to be maintained until the successor state should, 'if it considers that the maintenance of any of these concessions would be contrary to the public interest', within a period of six months from the date when the territory was to be placed under its authority, 'buy out' such concessions subject to 'equitable compensation'.[2] This right to cancel the concessions was not incorporated in the Treaty of Lausanne, but was recognized in an exchange of Notes between the British and French delegations. The British Government agreed not to avail itself as regards the French Government of the provisions of Protocol XII relating to maintenance of concessions. 'In consequence, and within a period of one year from the coming into force of the Treaty of Peace of today's date, the French Government will have the power, in the territories detached from Turkey in which it exercises authority as mandatory, to proceed to the repurchase of concessions for public services of which British nationals may be the beneficiaries. In this event, the concessionaire will receive equitable compensation.'[3]

In its pleadings in the *Mavrommatis* case, the Greek Government was in favour of the view that the successor state had the right to expropriate the concession, but only subject to payment of compensation.[4] The agreement between the Netherlands and Indonesia not only admits the principle of expropriation, but limits its operation in a way that may well serve as a model for similar arrangements in the future. 'Expropriation, nationalization, liquidation, compulsory cession, and transfer of properties or rights' might take place exclusively for the public benefit, 'against previously

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be tacit, but Dr. Mosler seems to be of the view that the successor state can bring about this novation because it has sovereign power to bind the concessionaire irrespective of his will.

[1] Loc. cit., p. 8.

[2] *The Treaties of Peace*, 1919–23, Carnegie Endowment Publication (1924), vol. ii, Art. 311, p. 908.

[3] *British Treaty Series*, 1923, No. 17 (Cmd. 1946).

[4] 'Whereas', it was stated in the judgment, 'the British Government is of opinion that the fact that the successor Governments are placed under an obligation to maintain the concessions . . . whilst no mention is made of a right to expropriate them, is indicative of an intention to exclude such a right, the Greek Government, on the other hand, considers that the existence of such a right of expropriation is to be assumed' (loc. cit., Ser. A, No. 5, p. 38).

enjoyed or guaranteed indemnity to be fixed by judicial decision at the real value of the object involved'.[1] In 1944 the Soviet Union paid compensation for the expropriation of the Petsamo Nickel Mines Concession in territory ceded to her from Finland. This company was a subsidiary of a British company, which in turn was a subsidiary of a Canadian company. The Soviet Government agreed to pay compensation to the latter.[2]

It is also to be noted that the claims of British concessionaires in Madagascar which were considered by the Law Officers arose out of disputes concerning not so much the competence of France to expropriate the concessions, but rather the amount of compensation offered. The Opinion of 2 February 1898 is an example of the inexactitude of much of the legal argument to be found in diplomatic correspondence relative to problems of state succession. It commenced by asserting that the grant 'amounted in substance to a contract', and that 'the French Government inherited this obligation'; it would be a 'breach of contract if the holders of such land were evicted'. This argument seems on the face of it to be in favour of subrogation. It concludes, however, by admitting the competence of the French Government to reclaim the lands if they were 'wanted for public purposes and adequate compensation was paid'.[3]

The juridical justification for the obligation to pay compensation is to be found in the concept of unjustified enrichment, which lies at the basis of the doctrine of acquired rights and constitutes, as Professor Gidel says, 'a positive obligation which exists in the relations between individuals, and which has been sanctioned in every legislation and has a fixed place in international law'.[4] If a successor state destroys the interest of a concessionaire the latter has suffered a detriment and the former is enriched at his expense. The enrichment consists in the value of the interest appropriated. 'Individual confiscation of property without indemnity', says Dr. Kaeckenbeeck, 'undoubtedly falls short of the international standard of civilized society because it violates the sense of equity of the civilized world on which its deepest legal convictions rest, which is at the root of all legislation on expropriation, and which has been ratified by a long international custom.'[1]

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[1] Loc. cit., Art. 3.

[2] Protocol of 8 October 1944; Mosler, op. cit., p. 136.

[3] See *supra*.

[4] Op. cit., p. 134. For a review of the French cases see David in *Cambridge Law Journal*, 5 (1935), p. 209. 'The doctrine of unjustified enrichment', he states, 'is one of the most interesting features of modern French law' (at p. 222). See German Civil Code, Art. 812, and a review of the German cases given by Professor Friedmann in *Canadian Bar Review*, 16 (1938), p. 242. See also the Swiss Civil Code, Art. 62.

The doctrine, after being eclipsed during the nineteenth century, is now receiving increasing attention in English law: *Moses* v. *Macferlan* (1760), 2 Burr. 1005; *Nelson* v. *Larholt*, [1948] 1 K.B. 339, at p. 343; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 33, at p. 61. The following writers support the doctrine: Pound in *Harvard Law Review*, 33 (1920), pp. 421 ff.; Keener, ibid., 1 (1887), p. 117; ibid., 10 (1896), p. 209; Seavey and Scott in *Law Quarterly Review*, 54 (1938), p. 44; Holdsworth, ibid., 55 (1939), pp. 37 ff.; Winfield, ibid., 64 (1948), p. 46; Lord Wright in *Cambridge Law Journal*, 6 (1938), pp. 305 ff.

Professor Gutteridge has expressed doubts as to the extent of the recognition of the doctrine: ibid., 5 (1938), pp. 204 ff. His criticism, however, must be read in the light of the more recent cases quoted above (Cheshire and Fifoot, *Law of Contract* (2nd ed., 1949), pp. 488 ff.).

It is upon some such basis as that of unjustified enrichment that the principles of compensation can best be rationalized. The title-holder is not indemnified because the state has committed some tortious act, nor because it has broken a legal relationship existing between him and itself. On the contrary, compensation is paid, as Dr. Kaeckenbeeck points out, 'simply as an equitable alleviation of the economic sacrifice demanded on behalf of the community'.[2] For this reason, the compensation which must be paid need not be the maximum. The injustice is relieved by a payment which is reasonable and approximates to the lowest market value of the interest. This is a standard established in diplomatic practice, and it is as yet only rudimentary. If compensation is the only obligation which international law imposes on the successor state, the qualifications introduced into the Transvaal Report become more consistent. The successor state can be under no obligation to put the concessionaire in a better equitable position than he was in before the change of sovereignty. Hence, as the Report emphasizes, if the predecessor state was insolvent, its worthless obligations could not be converted into valuable ones upon its extinction. Furthermore, as the Report went on, 'in determining the amount of compensation in respect of losses sustained by the owner of a concession cancelled or modified as injurious to the public interest, regard must justly be paid to the question whether the owner, at the time when he received or acquired the concession, knew, or ought reasonably to have known, that it was precarious. A concession may be precarious for many reasons, but it certainly is so if it is closely related to large and changing public interests.'[3]

In order that the rule of international law with respect to compensation shall be operative, certain conditions clearly must be fulfilled. The concession must have been regularly and bona fide obtained, with a proper observance of legal forms, and it must not be conditional either on the continued survival of the predecessor state or upon any other factor which cannot be fulfilled. The law of the predecessor state is the criterion for determining these matters.[4] As there is no question of an obligation to continue the terms of the concession, it is immaterial that the concession is contrary to the public interest of the successor state, or in violation of its treaty obligations.

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[1] This *Year Book*, 17 (1935), p. 16.

[2] Ibid.; *Recueil des cours de l'Académie de droit international*, 59 (1937), p. 359. The United States, in the dispute with Mexico which followed the expropriation by the latter of the interests of United States oil companies, asserted that expropriation must be accompanied by provision for 'adequate, effective and prompt payment for the properties seized' (Hyde in *American Journal of International Law*, 32 (1928), p. 759.

[3] Loc. cit., p. 8. See also Mosler, op. cit., p. 158.

[4] Kaeckenbeeck in *Recueil des cours de l'Académie de droit international*, 59 (1937), p. 351.

The doctrine concerning the 'odious' character of certain concessions, which the United States tended to develop after the Spanish-American War, has not been sanctioned by subsequent practice, and remains as vague as when it was enunciated.[1] The principle of restitution is applicable to 'odious' concessions as much as to any others because the works undertaken are useful to the successor state and do in fact enrich it. The origin of the concession is thus immaterial.[2] The only acknowledgement of the doctrine of 'odious' concessions made by the Law Officers was with respect to grants made during a war with the annexing state. It is possible that a qualification to the general principle is here admitted in state practice, but it requires more evidence to establish itself as recognized in international law. Similar reasoning disposes of the argument that concessions in undeveloped lands need not be respected. Such concessions, it is true, may have been granted precisely because the undeveloped country was incapable of exploiting its own natural resources. However, as the successor state is enriched by the work done it owes a duty of compensation.[3]

V. *Conclusion*

The doctrine of acquired rights is perhaps one of the few principles firmly established in the law of state succession. There is, as the Memorandum submitted by the Secretary-General of the United Nations to the International Law Commission in 1949 suggests, 'no adequate measure of certainty with regard to its application to the various categories of private rights such as those grounded in the public debt, in concessionary contracts, in relations of government service and the like'.[4] Despite that uncertainty, the assimilation of these categories to the concept of acquired rights is probably the basis upon which the treatment of most of the problems of state succession may profitably be attempted. In the present article an attempt has been made to apply the doctrine of acquired rights to concessions, and the following principles may be suggested by way of conclusion:

1. A concessionary contract is terminated by extinction of the personality of the conceding state or the expulsion of its sovereignty from the territory subject to the operations of the concession.

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[1] See Mosler, op. cit., p. 168. It is to be noted that Protocol XII to the Treaty of Lausanne excluded from protection concessions granted after the outbreak of war. Concessions of this type are frequently assimilated to 'war debts'.

[2] Ibid., p. 169.

[3] Ibid., p. 178.

[4] *Survey of International Law in Relation to the work of Codification of the International Law Commission. Preparatory Work.* Memorandum submitted by the Secretary-General. United Nations Doc. A/CN.4/Rev. 1.

2. Because the concessionary contract does not survive the change of sovereignty the successor state is not subrogated in the rights and duties which it created.

3. Although any contractual rights which the concessionaire possessed have expired, he retains, subsequent to the change of sovereignty, an equitable interest in the money which he has invested and the labour he has expended. This interest constitutes an acquired right which the successor state is obliged by international law to respect.

4. The successor state may fulfil its obligations towards the concessionaire in any one of the following ways:

(*a*) It may subrogate itself in the terms of the concession by novation of the contract.

(*b*) It may modify the terms of the concession or grant alternative facilities with full recognition of the equities involved.

(*c*) Since it is not bound by the terms of the contract it may expropriate the concession provided that:

  (i) compensation is paid. The standard of compensation will vary according to the circumstances of each particular case. It is suggested that generally it will be the amount of the capital and the value of the labour expended on the concession. It may also be the lowest market value of the works immediately anterior to the expropriation. The only principle so far admitted in international law is that compensation must be 'reasonable and equitable';

  (ii) there is no discrimination against foreign nationals. If there is such discrimination it is possible that the successor state may incur responsibility under the doctrine of denial of justice.

5. An equitable interest in a concession, to receive protection in the above manner, must:

(*a*) Originate in a contract regular in form, bona fide obtained, and unconditional in character.

(*b*) Possess a real and not merely illusory monetary value. Hence it is possible that full compensation need not be paid to a concessionaire whose interest is bankrupt or precarious.

(*c*) (Possibly) not have arisen out of a grant made to assist the prosecution of a war against the successor state. The criterion in such a case is the extent to which the concession can be assimilated to a 'war debt'.

NATIONALITY OF CLAIMS: BRITISH PRACTICE

By I. M. SINCLAIR, LL.B. (Cantab.)

I

It has long been a settled rule of international law that, for a claim to be sustainable before a Mixed Claims Commission, the claimant must be a national of the state which is presenting the claim both at the time when the injury occurred and continuously thereafter up to the date of presentation of the claim. This rule, although admitting of some slight exceptions, is sufficiently established to have withstood some very severe criticism in recent years.[1] Such criticism has generally been based on the grounds that it deprives the individual of any status in the sphere of international law, that it denies to the stateless person any hope of redress for injuries inflicted by the authorities of the state in which he is resident, and that, in its insistence on the necessity for continuous national character, it denies to many otherwise worthy claimants the possibility of securing that compensation which a more equitable system would accord to them. That the rule is inconsistent with recent developments in international law is also freely asserted.[2] There can be little doubt that the rule, as now applied by international tribunals, is harsh and oppressive in many of its aspects. However, until the function of diplomatic protection ceases to be exercised by national states and is replaced by some system whereby individuals, regardless of nationality, are granted procedural capacity to sustain claims before international tribunals, its influence is likely to continue.

The jurisprudential basis of the rule of nationality of claims has been formulated with clarity in the Judgment of the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway* case:[3]

> 'In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law. This right is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection, and it is as a part of the function of diplomatic protection that the right to take up a claim and to ensure respect for the rules of international law must be envisaged. Where the injury was done to the national of

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[1] See *Annuaire de l'Institut de Droit International* (1932), pp. 479 ff. (hereinafter cited as *Annuaire*), for criticisms by Politis and de Lapradelle; see also Jessup, *Modern Law of Nations* (1948), Chap. V.

[2] Lauterpacht in *Law Quarterly Review*, 63 (1948), pp. 456–7; Idelson in *Transactions of the Grotius Society*, 30 (1945), pp. 60–62.

[3] *Publications of the P.C.I.J.*, Series A/B, No. 76, p. 16.

some other state, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.'

This may be taken as an expression of the orthodox doctrine that states alone are subjects of international law. It may be considered that the rule of nationality of claims accords well with such a doctrine, for there can be little doubt that, if indeed the right of diplomatic protection is dependent upon the nationality of the individual, and if such a right pertains only to states, a plausible and consistent system is thereby established. The claim of the individual to redress for his injuries suffered abroad is, through the bond of nationality, transformed into a claim of the state, of which he is a national, against the state in which he has sustained his losses. This explanation of the current doctrine is not, however, fully convincing. If in advancing the claim of one of its nationals the state is indeed asserting 'its own right, the right to ensure in the person of its national respect for the rules of international law', no change of nationality between the time when the injury occurred and the time when the claim is presented would affect this right which had vested in the state at the time when the injury occurred. The opposite rule has, however, repeatedly been acted upon by international tribunals,[1] and it is now well established that a state is not entitled to espouse the claim of a person who, though its national at the time when the claim originated, has lost that nationality or acquired the nationality of the respondent state, whether voluntarily[2] or involuntarily,[3] prior to the presentation of the claim. Thus, the orthodox view of the nature of the rule of nationality of claims is untenable in so far as it is regarded as being a corollary of the theory that states alone possess international personality.

How then did the rule originate that the national character of the claimant must be proved not only at the time the injury occurred but also at the time when the claim is presented to the Commission? The explanation is probably to be found in the nature of the international judicial process. During the nineteenth century there was no international court to which disputes could be referred by contending states. The machinery of arbitration was invoked only after all possible means of direct diplomatic action had failed. When an assault was committed upon an Englishman at

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[1] *Perché* (*France*) v. *U.S.*, 15 January 1880, Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), pp. 2401–18 (hereinafter cited as *International Arbitrations*).

[2] *Gribble* (*G. B.*) v. *U.S.*, 8 May 1871, Hale's *Report*, p. 14; cases of *Brailsford*, *Taylor*, *Kent*, and *Williams*, 1799, Moore, *International Adjudications* (*Modern Series*), vol. iii (1931), pp. 53–54.

[3] As by operation of law: *Levy* (*France*) v. *U.S.*, 15 January 1880, Moore, *International Arbitrations*, pp. 2514–18 (collective naturalization); *Stevenson* (*G. B.*) v. *Venezuela*, 13 February 1903, Ralston, *Venezuelan Arbitrations of 1903*, p. 438 (marriage); and cases cited by Borchard in *Annuaire*, i (1931), p. 283.

Florence in 1852, the British Government entered into a long controversy with the Tuscan Government over the responsibility of the latter for acts of an Austrian auxiliary force committed within its jurisdiction; the incident was finally closed by an *ex gratia* payment to the injured person, but the interesting feature is that the Foreign Secretary instructed the local British representative that 'as a last resource [he] might ask for arbitration'.[1] Such distrust of the arbitral procedure is also reflected in the fact that claims for injuries suffered by nationals abroad, unless of a particularly gross and aggravated character, were the subject of interminable diplomatic negotiations; and only when sufficient claims had accumulated to make further postponement of their settlement dangerous was it considered necessary to set up a Mixed Claims Commission. Such Claims Commissions were limited in their jurisdiction by the terms of the *ad hoc* convention under which they had been constituted, and a strict interpretation of the terms of the convention in question generally resulted in dismissal of the claim unless the claimant was able to prove that he possessed the nationality of the demanding state at the time of the presentation of the claim. Thus, there was no need to insert in the terms of the Convention any clause relating to the necessity for continuous national character; the ordinary rules of treaty interpretation were sufficient to ensure that, to be a British 'subject' or United States 'citizen' under the Convention, nationality must be proved, not only at the time the injury occurred, but also at the time the claim was presented for adjudication. However, some Claims Conventions did contain nationality provisions; for instance the Convention for the settlement of Claims between Great Britain and Mexico of 26 June 1866 provided:[2]

> 'It is equally to be understood that only such claims shall be admitted for which the Mexican Government is responsible in accordance with generally admitted principles of international law, and which are in origin, continuity and actuality British.'

If, as is suggested, the necessity for the claimant to prove his nationality at the time of presentation of the claim depends upon interpretation of the treaty, national ownership of the claim at the time of signature of the treaty should be sufficient to give the commission jurisdiction; and, indeed, this principle has been followed on several occasions.[3] The date of ratification of the treaty has, however, also been held relevant when the nationality of the claimant has been questioned,[4] and the United States Supreme Court has gone farther in requiring citizenship at the time both of presentation and of judgment.[1] An even more stringent application of the rule is to be found in a case decided by the British–Mexican Claims Commission established under the Convention of 19 November 1926. Although the claim in this case had been in British hands from the date of origin to that of presentation, the claimant had lost her British nationality after the last-mentioned date and before that of the decision. The Commission, in dismissing the claim, stated that 'it cannot be denied that when it is certain and known to the tribunal that a change of nationality has taken place prior to the date of the award, it would hardly be just to obligate the respondent Government to pay compensation to a citizen of a country other than that with which it entered into a convention'.[2]

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[1] Earl of Malmesbury to Hon. P. C. Scarlett, 9 April 1852 (*Parliamentary Papers* (1852), vol. lv, p. 74).

[2] *Parliamentary Papers* (1867), vol. lxxiv, p. 501.

[3] *Sandoval* (*U.S.*) v. *Mexico*, 3 March 1849, Moore, *International Arbitrations*, p. 2323.

[4] Administrative Decision V, Mixed Claims Commission, United States and Germany (see Hackworth, *Digest of International Law*, vol. v (1943), pp. 806–7).

This would appear to make the decision of the tribunal dependent, not on the principle that the state in taking up the claim of its national is in fact asserting its own right, nor yet on the principle that jurisdiction is limited by the terms of the Claims Convention, but on the principle that it is an implied provision of the treaty that only the nationals of the signatory states should benefit therefrom. Such a principle, considered *in vacuo*, is reasonable enough, but it hardly makes for a consistent theory of nationality of claims.

Less difficulty is presented by the principle that the claim must be national in origin. Such a principle flows naturally from the correlative duties of allegiance and protection; the subject owes a duty of allegiance to the state, the state owes a duty of protection to the subject. Protection by the state is a consequence of allegiance to the state.[3] Thus, if the claimant becomes naturalized in another country between the time when the injury occurred and the time when it is presented for adjudication,[4] or if the claim passes, by assignment or operation of law, into the hands of a person not a national of the same state as the original claimant,[5] the claim is not sustainable, even if, in the latter case, the new claimant is a national of a state party to a Claims Convention with the defendant state.

The real difficulty would, therefore, appear to be to find some point of time beyond which nationality need not be proved. The date of 'presentation' of the claim is a very vague criterion, susceptible of different interpretations. Moreover, it may give rise to certain practical difficulties. In a case which arose before the Anglo-American Claims Commission under the Agreement of 1910, certain claims, known as the Hawaiian Claims, were 'presented', in the sense of being agreed between the Governments as claims to be arbitrated, on 6 July 1911, but the claims were not heard until 1925. During the interval, several of the claimants had acquired American nationality, and the British Government withdrew their claims.[1]

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[1] *Burthe* v. *Denis* (1890), 133 U.S. 514.

[2] *Minnie Stevens Eschauzier* (*G.B.*) v. *Mexico*, Hackworth, *Digest*, vol. v, pp. 805–6.

[3] Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 660.

[4] *Medina* (*U.S.*) v. *Costa Rica*, 2 July 1860, Moore, *Arbitrations*, p. 2483; see also Politis–Lapradelle, *Recueil des Arbitrages Internationaux*, vol. ii (1856–72), pp. 164–77, for a discussion of this case; *Abbiatti* (*U.S.*) v. *Venezuela*, 5 December 1885, Moore, *International Arbitrations*, p. 2347.

[5] See cases cited in Borchard, op. cit., p. 662, and Ralston, *Law and Procedure of International Tribunals* (1926), pp. 163–6.

Sir Cecil Hurst puts forward the view that nationality must be held by the claimant until the judgment of the Commission:[2]

> 'The beneficiaries must possess the nationality of the claimant state at the time the claim is put forward, because in the absence of such nationality the state is not justified in putting forward the claim; but the beneficiaries must also possess the nationality of the claimant state from the time of presentation up till the making of the award, because up till that moment it is open to a tribunal to admit and take into account any evidence that is submitted by either Government to support or to assist a claim.'

This theory may explain why the procedure of the tribunal should be no bar to the setting up of such a defence, but it does not explain why the claim should be capable of being resisted substantively on the ground that, though national in origin, it is no longer national at the time of the award. The necessity for continuous national character up to the date of the award is also stressed in the *Benchiton* case, where, however, Judge Huber argues that nationality at the date of presentation implies nationality at the date of judgment:

> 'It is a well established principle of international jurisprudence that a claim must be national from the point of view of the demanding state from its origin until its presentation as a claim of international law. By presentation must be understood not only the first presentation by way of diplomacy, but the totality of the acts by which the claim is sustained upon the basis of international law. It results from it that the national character of the demand must exist up to the moment of the judgment, or at the least, the closing of the discussion.'[3]

Despite the confused state of the authorities, a majority of the states at the Hague Codification Conference favoured the view that the claimant state must prove the nationality of the claim up to the date of the award.[4]

The inconsistency of the decisions and of the views expressed therein is explicable if allowance is made for the fact that each tribunal is bound by the terms of the convention under which it has been constituted. No one case is an authoritative precedent for any particular theory, though it may be authoritative for any future case submitted to the same commission on a question of nationality. Moreover, the rule of nationality of claims may be ousted by the wording of the convention. The United States–Venezuelan Claims Commission of 1903 was given jurisdiction over claims 'owned by citizens of the United States', and it was held by Umpire Barge that, by the adoption of this phrase, the two Governments had contracted out of the ordinary rule requiring the claim to be national in origin. The clause was construed to mean owned at the time of the signature of the protocol; thus, although jurisdiction was taken of a claim originally belonging to a foreign company, but owned at the time of presentation by an American corporation,[1] claims which came into the hands of American citizens subsequent to the date of signature of the protocol were disallowed.[2] The *Landreau* claim is also in point.[3] This was a claim by the United States against Peru submitted by a protocol of 21 May 1921 to an International Arbitral Commission of three members. In the pleadings before the tribunal, the Peruvian agent maintained that at the time when the claim originated in 1865, Landreau was a French subject and that his subsequent naturalization as an American citizen was not sufficient to oust the rule of nationality of claims and justify the United States in taking up his case. The Commission found it difficult to appreciate this argument, as the two Governments had agreed in the protocol that the tribunal was to decide upon this specific claim—'all that the tribunal has to do is to decide the dispute in the terms of the protocol'.[4]

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[1] Nielsen's *Report*, p. 30.

[2] This *Year Book*, 7 (1926), p. 180.

[3] *Annual Digest*, 1923–4, p. 189.

[4] *Bases of Discussion*, Hague Codification Conference (1930), vol. iii, pp. 140–5.

Various other commissions have made strenuous efforts to mitigate the unfortunate consequences of the rule, and a number of decisions reveal the growing tendency of tribunals to interpret the rule of nationality of claims in the light of the arbitration agreement.[5] The rule itself, as has been seen, is far from sacrosanct, and expediency, rather than principle, appears to be the motivating factor; indeed, no better reason can be advanced for its survival than that plaintiff states are loath to espouse the claims of those who were not its nationals at the time of injury, and defendant states are equally loath to grant compensation to those who are no longer the nationals of the state with which they entered into an arbitration agreement. The direct control exercised by states over the claims of their nationals is, therefore, of some importance in this matter; if the function of diplomatic protection continues to be exercised by states, then states will insist on the preservation of a rule which pays homage to the doctrine of state sovereignty and at the same time accords well with the traditional view of the relation between citizen and state—the citizen owing allegiance, the state granting protection.

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[1] *Orinoco Steamship Co.* (*U.S.*) v. *Venezuela*, 17 February 1903, Ralston, *Venezuelan Arbitrations*, pp. 72, 84.

[2] *Anderson* (*U.S.*) v. *Venezuela*, 17 February 1903, ibid., p. 167.

[3] Ralston, *Law and Procedure of International Tribunals*, p. 165.

[4] See also *Alsop* (*U.S.*) v. *Chile*, 5 July 1911, where the Chilean contention that the company, though largely owned by American stockholders, was Chilean, was dismissed on the ground that the special agreement precluded an inquiry into the nationality of the claim (*American Journal of International Law*, 5 (1911), p. 1085).

[5] See especially *Salem* (*U.S.*) v. *Egypt*, 8 June 1932, *Annual Digest*, 1931–2, p. 188; also *Pablo Najera* (*France*) v. *Mexico*, 19 October 1928, *Annual Digest*, 1927–8, p. 256.

Thus, despite the growing realization that the individual may be regarded as a subject of international law, much remains to be done before full procedural capacity can be given to individuals in the international sphere. In these circumstances the rule of nationality of claims is certain to come under increasing attack from those seeking to establish the international personality of the individual, and it may be useful to establish how the rule developed in the nineteenth century in British practice and how this development is reflected in present-day practice.

II. *Nineteenth-century British practice*

1. *Domicil as determining national character*

Considerable confusion arose in the nineteenth century over the question whether domicil alone, without any specific act of naturalization, was sufficient to confer the nationality of the state of residence upon an alien permanently settled therein, and so oust, as against such state, the protective functions of the state to which the alien owed natural allegiance. The problem was further complicated by the fact that, prior to 1870, the British Government did not recognize the right of expatriation; allegiance to the British Crown was exacted from all natural-born British subjects, no matter whether resident abroad, domiciled abroad, or even naturalized abroad. This concept of perpetual allegiance provoked numerous conflicts with the United States, and was responsible, *inter alia*, for the war of 1812. Thus, the situation arose that a natural-born British subject who became a naturalized United States citizen was still regarded as owing allegiance to the British Crown, and was liable, on entering British jurisdiction, to be arrested for offences against the state.[1]

While the British Government was not averse to claiming the perpetual allegiance of natural-born British subjects, it was rather more cautious in asserting its right to protect such natural-born subjects as were possessed, either by birth or by naturalization, of another nationality; as against the state whose nationality he had also acquired, a British subject could not claim the intercession of Great Britain.[2] This caution even extended to cases where the British subject claiming protection was only domiciled in the foreign country and had not acquired its nationality; and though a clear distinction was generally drawn between naturalization and mere domicil, cases have arisen in which the claim to protection has been refused on the ground that the claimant was domiciled abroad. The following instruction was addressed to the British representative at Madrid on the case of a

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[1] *Report of the Royal Commissioners for inquiring into the Laws of Naturalization and Allegiance* (*Parl. Papers*, vol. xxv (1868–9), pp. 663, 669–72).

[2] Cockburn, *Nationality* (1869), pp. 106–11.

British subject born in Spain and claiming exemption from military service:

> 'With respect to the particular cases of Lieutenant Arguimban and his son Mr. Joseph Arguimban, and to any other cases which may come under the same category, I am advised that they should be determined by the domicil of the parents at the time of the birth of the children within the territories of the Crown of Spain. If at the time of the birth of Lieutenant Arguimban, his father was not only a natural-born British subject but legally domiciled in the British dominions, I am of opinion that Lieutenant Arguimban himself was at the time of his birth a British subject, owing permanent allegiance to the British Crown, and entitled to British protection. If, on the contrary, his father was then domiciled in the dominions of the Spanish Crown, he became a Spanish subject, and is not entitled to claim British protection against any obligations resulting from his Spanish allegiance, although by an English statute he may be also entitled to the privileges of a natural-born British subject in Great Britain.'[1]

This instruction must be regarded as exceptional, for there can be little doubt that the practice of Great Britain was to regard domicil as a criterion for private-law purposes alone;[2] while it might be a factor in determining the extent of the protection to be afforded to British subjects abroad (a foreign domicil was generally regarded as an element adverse to the exercise of the protective function), it did not operate, in the British view, to extinguish the right of the home state to intercede on behalf of its nationals who had suffered injury abroad. The submission of the alien to local laws and institutions did not necessitate his being deprived of the protection of his national state. This view was expressed with considerable force by the Law Officers of the Crown when a question was raised as to the extent of the rights and immunities of British subjects resident in New Granada:

> 'It is, we apprehend, perfectly clear that British subjects, who may have become domiciled in New Granada, must submit to the general operation of the laws and institutions of that country, in the same manner, as if they were natural born citizens thereof: and that their right to British protection (though not forfeited, unless they have also taken steps to become naturalized, and to renounce their British allegiance in favour of the Government of New Granada) does not exempt them from the duty of rendering obedience to those laws and institutions, while resident there, or from liability, in common with all the other inhabitants of that country, to the ordinary penalties of disobedience thereto, according to the course of the local law.'[3]

This Opinion stresses the submission of the alien to the jurisdiction of the state in which he is domiciled, and it must be understood in the light of the circumstance that British settlers, having interfered unjustifiably in local politics, were claiming privileges which were not accorded to native inhabitants of the country. In a later Opinion on the same vexed question

[1] Earl Russell to Sir J. Crampton, 9 July 1862 (*Parl. Papers*, vol. xxv (1868–9), p. 696).

[2] Lord Westbury in *Udny* v. *Udny* (1869), L.R. 1 H.L. 441, at p. 457.

[3] *Report of the Law Officers of the Crown dated 22 July 1862* (F.O. 83/2256).

as to how far domicil in a foreign country excludes exercise of the right of protection, emphasis is laid on the rights of the domiciled alien rather than on his duties:

> 'We are of opinion that a domicil established by length of residence only, without naturalization or any other formal act whereby the domiciled person has, so to speak, incorporated himself into the State in which he resides, does not "for the time convert him into a subject of the domicil in all respects save the allegiance he owes his native Sovereign". This proposition is we think far too broad. Such a domiciled person is not a citizen (*civis*) but a temporary subject (*subditus temporarius*) of the State in which he is resident. He cannot lawfully be compelled to serve in the military forces of that state, against any other state, or be compelled to enrol himself in the militia of the state; though it would be his duty to co-operate with native citizens, when called upon to do so by the proper authorities, in keeping the peace, and preserving good order in the particular place in which he resides, as for instance against thieves or pirates.
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> 'With respect to the performance of civil duties, we are of opinion that he is liable to the performance of such as by the law of the state were obligatory on resident foreigners at the time when he took up his abode therein; upon the principle that he is bound to apprise himself of such existing liabilities before by his voluntary act he enters a foreign state in which they already by law exist.
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> 'With regard to other civil duties imposed after his domicil has been established, he is entitled to the option of being permitted to leave the state or to remain and consent to the imposition of the new burthen. He is in every other respect, apart from the exceptions provided by treaties, or established by custom, subject, like the native citizen, to the general law, civil and criminal, of the state in which he chooses to reside. We must not be understood as expressing any opinion respecting the *status* of foreigners who have become purchasers of territory in a state.
>
> 'We may add that in case of illegal acts (acts contrary to the *lex loci*) or of acts at variance with the common principles of justice being committed by, or with the sanction of foreign governments, to the prejudice of resident foreigners, who have not sought a new citizenship in the particular state, the interference on their behalf of the representative of their own state with a view either to prevention or redress, is permitted and its propriety is recognized by diplomatic usage. It is otherwise where the individual has by his own choice, and by naturalization or otherwise become a subject of the foreign state.'[1]

The submission of the domiciled alien to the local jurisdiction was more emphatically asserted in cases where British subjects had purchased real property in the state of their domicil and had appealed to the British Government for diplomatic protection. Although the legal Opinion tendered to Her Majesty's Government in these cases did not go as far as to deny any right of interposition, such right was generally considered to be limited to 'exceptional cases of absolute refusal, or flagrant violation of justice *in re minime dubia*'.[2]

Domicil alone was thus considered to be a factor determining only the extent of the protection which should be afforded; it did not of itself, in the British view, divest the subject of his right to diplomatic protection, which depended entirely on his nationality. It cannot, however, be said that this view commanded universal approval at the time. Text-book writers generally recorded the view that 'the right of a state to interfere on behalf of its subjects is stronger when they are merely commorant than if domiciled'.[1] Phillimore[2] and Westlake[3] indeed went further in drawing a careful distinction between domicil and nationality as affecting the right to diplomatic protection, but there was considerable confusion among other writers as to the effect that domicil in a foreign country exerted upon the national character of the individual.[4]

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[1] *Report of the Law Officers of the Crown dated 29 September 1862* (F.O. 83/2214).

[2] *Report of the Queen's Advocate dated 7 November 1865* (F.O. 83/2224): similar views were expressed in the *Report of the King's Advocate dated 11 March 1831* (F.O. 83/2254) and the *Report of the Queen's Advocate dated 2 March 1871* (F.O. 83/2297).

This confusion was augmented by the strange decisions of the United States–British Claims Commission of 1853. The *Laurent* case, in particular, determined that, for the purposes of the Commission, British subjects who were domiciled in Mexico must be regarded as citizens of Mexico and hence unable to pursue their claim before the Commission. The judgment of the American Commissioner is of interest in that it demonstrates how closely interwoven with the question of domicil as a criterion of national character was the English doctrine of inalienable allegiance. The Convention under which the Commission was constituted provided that 'all claims on the part of corporations, companies, or private individuals, *subjects* of Her Brittanic Majesty, upon the Government of the United States, and all claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Brittanic Majesty'[5] should be referred to the Commission. The American Commissioner argued that if the term 'British subjects' in this article were interpreted according to English municipal law, it would include 'vast numbers of American citizens, embracing not only all the emigrants from Great Britain who have become settled and naturalized citizens of the United States since the Revolution, but their children and grandchildren who may have been born there'.[6] This, he contended, would be an absurd construction; 'the settled practice and usage of nations',[7] rather than the Statutes of England, should determine the definition of the term 'subject'. The authorities which the American Commissioner quoted in support of his view that a person going to a foreign country and becoming domiciled there, in the legal sense of that term, is to be regarded, for all civil purposes, as a subject and citizen of such country, were effectively shown by the British Commissioner to be only authorities 'for the well-known principle of international law, that foreigners, domiciled in an enemy's country, cannot set up a *neutral* character as against an invading force on account of their *foreign* origin, so as to entitle them to immunity from the ordinary consequences of war'.[1] Despite the cogency of the British Commissioners' arguments, however, the Umpire preferred to base his opinion that the claimants must be regarded, for the purposes of the Commission, as Mexican citizens on the numerous authorities bearing on the national character of property taken in war.[2] The principle laid down in the *Laurent* case was unwaveringly followed in the *Uhde*,[3] *Texas Bonds*,[4] and *McCalmont, Greaves & Co.*[5] cases decided by the same Commission.

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[1] Holland, *Lectures on International Law* (1933), p. 168.

[2] *Commentaries upon International Law*, vol. ii (3rd ed., 1879–88), p. 6.

[3] *International Law*, vol. i (2nd ed., 1910), pp. 198–206.

[4] For example, Halleck asserts that 'it is a general rule of public law that every person of full age has a right to change his nationality by choosing another domicil . . . when a person who has attained his majority removes to another place, and settles himself there, he is stamped with the national character of his new domicil' (*International Law*, vol. i (1908), p. 414). Twiss, though concerned mainly with the effect of domicil on private rights, alleges that 'according to the Law of Nations, when the national character of a person is to be ascertained, the first question is, in what territory does he reside, and is he resident in that territory for temporary purposes or permanently' (*Law of Nations* (1884), p. 272).

[5] Art. 1, Convention of 8 February 1853 for the settlement of outstanding Claims by a Mixed Commission, quoted in Hornby's *Report of the Proceedings of the Mixed Commission on Private Claims* (1856) (hereinafter cited as Hornby's *Report*).

[6] Hornby's *Report*, pp. 289–90.

[7] Ibid., p. 291.

The apprehension of the American authorities that to admit the British contention that domicil in a foreign country did not, in peace-time, affect the right of diplomatic protection was theoretically justifiable, if indeed to admit this contention would have resulted in the pressing of claims of British subjects who, by reason of the doctrine of inalienable allegiance, still possessed the status of British subjects despite acquisition of American citizenship by naturalization. There can be little doubt, however, that in practice the British Government consistently refused to espouse the claims of their subjects who, in addition to acquiring a domicil, for private-law purposes, in the foreign country, had also acquired the nationality or citizenship of that foreign country. Domicil might affect the *quantum* of protection that would be afforded; naturalization destroyed the very right to protection. Allegiance could be regarded as inalienable, but protection was not correspondingly inalienable. A long series of Opinions of the Queen's Advocate and the Law Officers confirms that this principle was invariably followed. The *rationale* of these Opinions is interesting; the practical convenience of the principle is perhaps best expressed in the Opinion 'that, in the absence of any treaty stipulation, Englishmen who have voluntarily become citizens of Mexico, and have thereby cast off, *so far as lies in their power*,[6] their allegiance to the British Crown, have no right whilst resident in Mexico to resume their original national character without the consent of the Mexican Government'.[1] The right to diplomatic protection was also considered as being forfeited in cases where the British subject, though not obtaining any express letters of naturalization, nevertheless took an oath of allegiance to the foreign country,[2] where the British subject accepted office in a foreign government,[3] though not if he merely entered the consular service of that foreign country,[4] and where the British subject enlisted in the military service of the foreign country.[5]

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[1] Hornby's *Report*, p. 281.

[2] Ibid., p. 299.

[3] Ibid., p. 456.

[4] Ibid., p. 198.

[5] Ibid., p. 399; the case is not reported on this point, but the question of domicil arose on demurrer—cf. ibid., p. 199.

[6] Italics supplied.

It is perhaps significant that the controversy as to whether domicil should be a factor determining national character abated considerably when Great Britain jettisoned the archaic notion of indelible allegiance. The Report of the Royal Commissioners for inquiring into the Laws of Naturalization and Allegiance[6] pointedly draws attention to the relationship between inalienable allegiance and the right to diplomatic protection:

> 'We are of opinion that this doctrine of the Common law [the doctrine of inalienable allegiance] is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a state which allows to its subjects absolute freedom of emigration. It is inexpedient that British law should maintain in practice, any obligations which it cannot enforce and ought not to enforce if it could; *and it is unfit that a country should remain subject to claims for protection on the part of persons who, so far as in them lies, have severed their connexion with it.*'[7]

The Commissioners, however, did not hesitate to express their view that mere domicil in a foreign country should not affect national character:

> 'We have considered the question whether acquisition of a foreign domicil, or a certain length of residence abroad, should divest a person of British nationality. We have not been able to satisfy ourselves that either continued residence or domicil could be practically adopted as a rule to determine the allegiance of the subject, having regard to the difficulties which attend the definition of domicil, and proof of the fact, and also to the great diversity of circumstances under which men reside in foreign countries.'[8]

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[1] *Report of the Queen's Advocate dated 7 August 1847* (F.O. 83/2303); see also *Report of the Queen's Advocate dated 11 August 1855* (F.O. 83/2239), *Report of the Law Officers of the Crown dated 3 June 1865* (F.O. 83/2224), *Report of the Law Officers of the Crown dated 12 July 1865* (F.O. 83/2224), *Report of the Law Officers of the Crown dated 31 May 1862* (F.O. 83/2214), and *Report of the Law Officers of the Crown dated 1 December 1863* (F.O. 83/2219).

[2] *Report of the Queen's Advocate dated 10 February 1870* (F.O. 83/2243).

[3] *Report of the Queen's Advocate dated 19 January 1864* (F.O. 83/2262).

[4] *Report of the King's Advocate dated 27 July 1832* (F.O. 83/2385); *Report of the Queen's Advocate dated 10 October 1848* (F.O. 83/2310).

[5] *Report of the Law Officers of the Crown dated 19 June 1860* (F.O. 83/2296), *Report of the Queen's Advocate dated 14 March 1846* (F.O. 83/2318), *Report of the Queen's Advocate dated 6 March 1849* (F.O. 83/2370).

[6] *Parl. Papers*, vol. xxv (1868–9), p. 607.

[7] Ibid., p. 611; italics supplied.

[8] Ibid., p. 612.

The principle, so firmly established in the *Laurent* case, that domicil could so far determine national character as to oust the claim of the national state, was decisively rejected by the Anglo-American Claims Commission of 1871 in the case of *Anthony Barclay*.[1] Barclay was a native-born British subject who resided in the United States for many years prior to 1858, when he took up residence in the State of Georgia; a claim was presented to the Commission by Great Britain on his behalf for acts of devastation and pillage by Sherman's troops during the American Civil War. It was contended for the United States:

1. That the respective terms 'citizens of the United States' and 'subjects of Her Britannic Majesty' should be taken, not in their strict meaning under municipal law of absolute citizenship for all purposes, or paramount allegiance to a Sovereign, but in the larger sense recognized by international law.
2. That under international law every person is deemed a subject or citizen of that country within which he is domiciled—or has taken up his residence permanently—without regard to birth or naturalization.
3. That within the principles above established, Barclay was not a subject of Her Britannic Majesty.

These contentions were vigorously attacked by the British Agent, who argued that the term 'subjects of Her Britannic Majesty' in the Treaty under which the Commission was established should not be so narrowly construed. The decision of the Commission, denying the American argument that domicil in a country without express naturalization could so affect the national character of the domiciliary as to exclude the right of the home state to prefer a claim on his behalf, is of interest in that it demonstrates yet again how substantive rules of law can be established under the guise of treaty interpretation:

> 'That [Barclay] is in fact a British subject there is no doubt; but it is contended that being domiciled in the United States, he is not one of those intended by the framers of this Treaty to be included in that term. It is undoubtedly true, as appears from various cases cited in the arguments that the subject or citizen of one state, domiciled in another, acquires in some respects privileges, and incurs liabilities distinct from those possessed in right of his original birth or citizenship. But he still remains the subject or citizen of the state to which he originally belonged, and we see no reason to suppose that it was the intention of either Government to put the limited meaning on the words "British subject" contended for in the arguments in support of the demurrer, so as to exclude from our jurisdiction a British subject who has never renounced his original allegiance, or become naturalized in any other country.'[2]

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[1] *Report of the Proceedings and Awards of the Mixed Commission on British and American Claims* (*Parl. Papers*, vol. lxxv (1874), p. 25).

[2] Moore, *International Arbitrations*, p. 2727.

The contention that a foreign domicil could, of itself, affect the right of the home state to intercede on behalf of a subject permanently resident abroad was silently abandoned after the decision in the *Barclay* case. It would probably be an over-simplification to maintain that this abandonment should be attributed primarily to the recognition by Great Britain in 1870 that the doctrine of inalienable allegiance was no longer consonant with the needs and interests of a trading nation whose merchants, in pursuit of their own ends, had, in many instances, identified themselves by naturalization with the citizens of a foreign country; however, there can be little doubt that the theoretical loss to Great Britain entailed in her abandonment of the old common law doctrine was more than offset by the gain which resulted from the recognition that domicil alone could not be regarded as a criterion for determining national character in time of peace.

2. *Protection of non-British subjects*

The principle whereby diplomatic protection could be afforded by Great Britain only to British subjects was regarded in the nineteenth century as unduly restrictive, and many attempts were made to extend the scope of the protective function. It must be admitted that little coherent legal principle can be extracted from the various legal Opinions tendered to the Foreign Secretary concerning the occasions on which diplomatic protection could be afforded to non-British subjects; nevertheless, these Opinions, though of only slight intrinsic value, are symptomatic of the inadequacy of the system. The concept of collective action for the protection of refugees and minorities had not yet crystallized, and unilateral action was the only method of ensuring the welfare of persecuted minorities.

This would appear to be the basis of the claim of the British Government to interfere on behalf of non-nationals who were being persecuted on religious grounds. Such interference was naturally regarded as exceptional, and no attempt was made to furnish a legal claim to take up the case of a non-national persecuted for his religious beliefs; the moral and humanitarian grounds were regarded as sufficiently strong to justify intercession. An example of the attitude adopted by the British Government in this type of situation is to be found in the case of Francesco and Rosina Madiai, Tuscan subjects, who were arrested, together with a British subject, on a charge of propagating the Protestant religion contrary to the laws of Tuscany; the British subject was released at the request of the British envoy, but the Madiais were not released. The British representative was instructed in the following terms to press for their liberation:

> 'Her Majesty's Government, although readily admitting as a general rule that a foreign Government has no right to call in question the dealings of another foreign Government with its own subjects, still maintains that cases may arise in which,

without giving just cause of offence, but rather as an evidence and result of sincere friendship, one foreign Government may intercede with another in favour of parties suffering, not for any crime offensive to morality or to the safety of society, but for the profession of a religious creed which is that of the national Church of the interceding state. And with still greater justice can such intercession be offered by a Government throughout whose extensive possessions the utmost toleration is granted in matters of religious faith, and which extends its protection equally and indifferently to the professions of all creeds, and specifically to those who hold to the same Church as is established in the country to which their appeal is made.'[1]

No such generous humanitarian impulse can account for the practice of extending British protection to aliens long resident in England. The Queen's Advocate, advising on the case of a native of Frankfort involved in legal proceedings in Naples, was of opinion that 'in consideration of his long residence in England as a merchant, and of his marriage with an English lady, and the birth of his children in this country, . . . Her Majesty's Government would have a right to interfere on his behalf with the Government of a foreign state in case of an acknowledged injury inflicted upon him in his mercantile capacity and a denial of justice by the authorities of such foreign state'.[2] It should be noted that in this case the alien to whom protection was afforded was injured in a third state; where the alien sought the protection of the British Government as against the country whose nationality he possessed, no such protection was afforded.[3]

In the case of aliens who acted as agents for British firms, the view generally taken was that such agents were not entitled to diplomatic protection—'if it should appear that the removal of any foreigner employed by British merchants would be attended with danger or inconvenience to the interests of his employers, [the consul] must endeavour by amicable arrangements to induce the Government to relax the severities of its measures and to recall its orders, but he cannot as a matter of right claim for them the privileges to which British subjects alone are entitled'.[4]

III. *Modern British practice*

The twentieth century has seen considerable development in the law relating to state responsibility. Not only has the speed and ease of modern travel resulted in a considerable increase in the numbers of British subjects who reside and carry on business in foreign countries, but new social theories and policies involving expropriation of foreign-owned property have demanded constant vigilance on the part of the Foreign Office to ensure that British interests are adequately protected. In these circumstances it is not surprising that the jurisprudential bases of the rules relating to nationality of claims should have been subjected to considerable investigation and development.

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[1] Earl of Malmesbury to Sir Henry Bulwer, 27 October 1852 (*Parl. Papers*, vol. cii (1852–3), p. 656); see also dispatch from Lord John Russell to Sir Henry Bulwer, 18 January 1853 (ibid., p. 667).

[2] *Report of the Queen's Advocate dated 15 May 1844* (F.O. 83/2341).

[3] *Report of the Queen's Advocate dated 7 March 1848* (F.O. 83/2292); *Report of the King's Advocate dated 26 July 1817* (F.O. 83/2337).

[4] *Report of the King's Advocate dated 19 September 1828* (P.O. 83/2254).

The Venezuelan Arbitrations of 1903 constitute a significant turning-point. In the *Stevenson*[1] case, a British subject, long resident in Venezuela, had suffered an injury at the hands of the Venezuelan authorities; before the claim was arbitrated the injured national died, and his claim passed by operation of law to his widow, a Venezuelan national according to Venezuelan law, and his twelve children, ten of whom were also Venezuelan nationals according to Venezuelan law. The British Agent advanced the interesting argument that in a claim brought by one state against another, the claimant state is seeking redress for an injury to itself and is not merely acting as representative for its injured national; thus, the fact that the injured national has since acquired the nationality of the respondent state should not bar the claim, which is founded on an injury to the claimant state *through* its national, an injury which still remains unatoned. This argument the Umpire rebutted with considerable force:

> 'The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. While the position of the learned Agent for Great Britain is undoubtedly correct, that underlying every claim for allowance before international tribunals there is always the indignity to the national [*sic*] through its national by the respondent government, there is always in Commissions of this character an injured national capable of claiming and receiving money compensation from the offending and respondent government. In all of the cases which have come under the notice of the umpire—and he has made diligent search for precedents—the tribunals have required a beneficiary of the nationality of the claimant nation lawfully entitled to be paid the ascertained charges or dues. They have required that this right should have vested in the beneficiary up to and at the time of the treaty authorising and providing for the international tribunal before which the claim is to appear. That it was then vested has been held as sufficient, and subsequent events have been held as not devesting this vested right. This however is as far as any tribunal of repute has gone.'[2]

The argument put forward by Great Britain in the *Stevenson* case was taken up by the United States in the *Studer* case, with this essential difference, that the American Agent in the *Studer* case contended that the decision in the *Stevenson* case was based upon the particular wording of the protocols setting up the Venezuelan Claims Commission, which limited its jurisdiction to claims by nationals of the claimant Governments;[3]

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[1] Ralston, *Venezuelan Arbitrations of 1903*, p. 438.

[2] Ibid., p. 450.

[3] Hurst in this *Year Book*, 7 (1926), p. 168.

according to the terms of the Pecuniary Claims Agreement of 1910, however, the cases brought before the Commission (which included the *Studer* case) were to be decided 'in accordance with treaty rights and with the principles of international law and equity'. The Tribunal found it unnecessary to pass upon this particular point, the claim being disallowed on its merits, but the arguments on both sides are interesting and instructive.

The view now taken by His Majesty's Government is based largely on the arguments put forward by the British Agent in the *Stevenson* case and the Judgment of the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway*[1] case. The following rules, which are taken from the General Instructions for His Majesty's Foreign Service, express clearly the principles adopted by the Foreign Office in taking up the claims of British subjects:

> '*Rule I*—The injury suffered by a claimant at the hands of a foreign State is deemed, in international law, to be an injury suffered by the State of which he is a national.
>
> '*Rule II*—His Majesty's Government will not take up the claim unless the claimant is a British national at the date of presentation of the claim and was so at the date of the injury.
>
> *Comment*: This bars the claim of a foreign national, losing his former nationality, between the date of the injury and the presentation of the claim, or of a Stateless person who has similarly become a British national whether or not he has re-acquired his former nationality.
>
> '*Rule VI*—Where the claimant has become or ceases to be a British national after the date of the injury, His Majesty's Government may in an appropriate case take up his claim in concert with the Government of the country of his former or subsequent nationality.
>
> *Comment*: In the case of a British-born woman who retained her British nationality on marriage to an alien, but who subsequently acquired her husband's nationality, thus becoming a dual national, His Majesty's Government would take up her claim subject to Rule VII.
>
> '*Rule VII*—Where the claimant is a dual national, His Majesty's Government will not take up his claim as a British national if the respondent State is the State of his second nationality, but may do so if the respondent State has, in the circumstances which give rise to the injury, treated the claimant as a British national.'

On the premise that the claim of an injured national against a foreign state is converted by operation of law into a claim of the national state against the foreign state, these rules are unexceptionable, though on that premise alone there would appear to be no necessity for continuity of nationality to the date of presentation of the claim. On the other hand, the rule that nationality of the claimant state must be proved up to the date of presentation of the claim is consecrated by a long series of arbitral decisions, and cannot be ignored; the harshness of its operation is, in any event, mitigated to a large degree by the effect of Rule VI, which provides for concerted action by the two national states on behalf of a claimant who has acquired another nationality after the date of the injury.

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[1] *Supra*, p. 125.

That the ordinary rules as to nationality of claims can be excluded by express treaty provisions is also recognized:

> '*Rule XI*—Where the express provision of any Treaty or International Agreement (including any Armistice or Peace Treaty) is inconsistent with one or more of Rules I to X, the former will, to the extent of the inconsistency, prevail; but in general the terms of any Treaty or International Agreement (including any Armistice or Peace Treaty) will be interpreted according to the rules of international law.
>
> '*Rule XII*—If the claimant has already had satisfaction of his claim by a municipal or other remedy, he will not be entitled to claim under a Treaty or International Agreement (including any Armistice or Peace Treaty).'

Particular importance must be attached to the principle that express treaty provisions prevail over the customary rules with which they are inconsistent, in view of the circumstance that a large proportion of present-day claims come within the machinery of the various Peace Treaties that have been established. The Peace Treaty with Italy provides, for example, that in cases where property cannot be returned intact or 'where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered'.[1] The term 'United Nations national' is specifically defined as 'individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status on September 3, 1943, the date of the Armistice with Italy'.[2] It is also further provided that 'the term United Nations nationals also includes all individuals, corporations or associations which, under the laws in force in Italy during the war have been treated as enemy'. All these provisions allow for the presentation of many claims which under the customary rules would be excluded. Nationality at the date of the Armistice and nationality at the date of coming into force of the Treaty need only be proved; there is no necessity to establish nationality at the time of the injury.

The far-reaching measures of nationalization which in recent years have been put into effect in certain Eastern European countries have resulted in the conclusion of a number of agreements concerning British interests affected by these measures. The customary rules of international law relating to nationality of claims have generally been followed; for instance, in the Anglo-Czechoslovakian Agreement of 28 September 1949 it is provided that, for the purposes of the Agreement, 'British nationals' shall mean:

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[1] Art. 78 (4) (*a*), Peace Treaty with Italy, 10 February 1947 (*Treaty Series*, No. 50 (1948), Cmd. 7481).

[2] Art. 78 (9) (*a*), Peace Treaty with Italy: there are identical provisions in the Peace Treaties with Bulgaria, Finland, Hungary, and Roumania.

> 'Physical persons who at the date of the signature of the present Agreement are citizens of the United Kingdom and Colonies . . . *provided that the persons concerned were equally British nationals in accordance with the foregoing definition at the date of the relevant Czechoslovak measure.*'[1]

An Interpretative Minute explains that 'the date of the relevant measure' means 'in all cases in which the measure concerned was effected by or as a direct consequence of law, the date of promulgation of the law, and, in any other case, the date of signature of the Compensation Agreement'. Where there has been confiscation and subsequent nationalization, 'the date of the relevant measure' means the date of the promulgation of the nationalization measure. The meaning of this Interpretative Minute is not exactly clear, but it appears to provide that nationality at the time of injury need not be proved if the injurious measures were not effected in virtue of a law properly promulgated.[2]

The Anglo-Polish Compensation Agreement of 24 January 1948[3] adopted a rather different method of determining nationality, a method more in accordance with traditional British views on this matter. British claimants were defined, for the purposes of the Agreement, as 'all physical persons who were British subjects on 3 January 1946 (and their heirs and legal representatives)'.[4] As the Polish Nationalization Law took effect on 3 January 1946, it was clear that nationality at the time of injury was considered to be the principal determining factor for the grant of compensation. It was, however, further provided that 'the grant of compensation, in accordance with the provisions of the present Minute, to any British claimant who became a British subject after 1 September, 1939, shall in each case be subject to prior study in the United Kingdom–Polish Mixed Commission'.[5]

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[1] *Treaty Series*, No. 60 (1949), Cmd. 7797, Art. 1 (*b*): italics supplied.

[2] The Foreign Compensation (Czechoslovakia) Order in Council, 1950, which lays down regulations for the distribution to individual claimants of the compensation granted to the British Government under the Agreement, allows individual claimants the option of proving nationality: (*a*) at the date of entry into force or the date of publication in the Czechoslovak Official Gazette, whichever is the later, of the Czechoslovak law or decree by or under which the property or interest in property was affected, (*b*) at the date on which the person making the application, or his predecessor in title, was deprived of title to or enjoyment of the property to which his claim relates, or (*c*) on 28 September 1949, if the person making the application, or his predecessor in title, was deprived of the enjoyment of the property to which his claim relates as a result of the property being placed under national administration under Czechoslovak Decree No. 5 of 1945 or Slovak Decree No. 50 of 1945 (Art. 15) (*S.I.* 1950, No. 1191). This explains rather more clearly that, only in the particular circumstances of clause (*c*) will nationality at the time of injury or earlier not require to be proved.

[3] *Treaty Series*, No. 23 (1948), Cmd. 7403.

[4] Art. I (1) (*b*).

[5] Art. I (2).

It can be seen, therefore, that modern British practice still insists that the claimant should be a British national both at the time when the injury was suffered and at the time when the claim is presented. In practice, the adoption of the rule that claims may be taken up in concert with the state whose nationality the claimant has acquired subsequent to the date of injury mitigates the hardship of the general rule; in addition, express treaty provisions (and, in present-day circumstances, the vast majority of claims against foreign states come within the terms of such treaties) are often so worded as to allow for the presentation of claims which would normally be excluded by virtue of the customary rule of international law.

THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS

By A. H. ROBERTSON, B.C.L., S.J.D.[1]

THE Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nations on 10 December 1948. As pointed out in a previous volume of this *Year Book*,[2] this Declaration had no legal validity, though its authors intended it to have 'a moral value and authority which is without precedent in the history of the world'.[3] 'The Declaration gives expression to what, in the fullness of time, ought to become principles of law generally recognised and acted upon by States Members of the United Nations.'[4] The General Assembly also in 1948 instructed the organs of the United Nations to give priority to the drafting of a Covenant of Human Rights, intended to give legal effect to the general principles enunciated in the Declaration. But agreement on legally enforceable obligations to protect the rights of the individual in nearly sixty heterogeneous states has been far from easy, and progress has been slow.[5] In the meantime a step forward has been taken on a regional basis by the signature in Rome[6] on 4 November 1950 by the Member states of the Council of Europe of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The signature of this Convention, little more than a year after the Council of Europe was created, represented the fruition of one of the first initiatives taken by this new phenomenon on the political horizon of Europe. It was also the most tangible result of the Council's work during the first year of its existence.

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[1] Of the Council of Europe Secretariat. Any opinions expressed in this article are those of the author and do not represent the views of the Secretariat-General of the Council of Europe. Nevertheless, the writer wishes to make acknowledgement to M. Arnold Struycken, Political Director of the Council of Europe, whose work as rapporteur in successive committees played a considerable part in the successful conclusion of the Convention, and who has been largely instrumental in making possible the compilation of this article.

[2] Lauterpacht, 'The Universal Declaration of Human Rights', in this *Year Book*, 25 (1948), p. 354.

[3] The words quoted are from the speech of the Belgian delegate on the occasion of the adoption of the Declaration (A/PV 181, p. 47).

[4] Lauterpacht, op. cit., p. 366.

[5] For the draft Covenant prepared by the Human Rights Commission see the *Report of the Sixth Session of the Commission*, Supplement No. 5, dated 25 May 1950. For the discussions of the draft Covenant by the Economic and Social Council at its eleventh session (August 1950) see the Council's Report to the General Assembly (*General Assembly Official Records*, Fifth Session, Supplement No. 3, A/1345, pp. 60–62). The Council referred certain questions of policy to the General Assembly and requested the Commission on Human Rights to reconsider the draft in the light of the decisions to be taken by the Assembly. For the decisions of the Assembly on 4 December 1950 see *United Nations Bulletin*, vol. ix, No. 12, p. 708.

[6] The Convention was signed in Rome on 4 November 1950 on behalf of the Governments of Belgium, Denmark, France, German Federal Republic, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Saar, Turkey, and the United Kingdom. It was subsequently signed in Paris on 28 November 1950 on behalf of the Governments of Greece and Sweden. These fifteen Governments constitute the total membership of the Council of Europe.

A. *History of the Convention*

1. *Proposal by the Consultative Assembly*

Article 1 of the Statute of the Council of Europe, which was signed in London on 5 May 1949,[1] provides that 'the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and to facilitate their economic and social progress. This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters, *and in the maintenance and further realisation of human rights and fundamental freedoms*. . . .' Article 3 of the Statute reads as follows: 'Every Member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.' The ability and willingness of a state to fulfil the provisions of Article 3 is, under Article 4, made a condition of membership. At the beginning of its first Session in August 1949, the Consultative Assembly of the Council of Europe proposed to include in its Agenda the study of 'measures for the fulfilment of the declared aim of the Council of Europe in accordance with Article 1 of the Statute in regard to the maintenance and further realisation of human rights and fundamental freedoms'. The Committee of Ministers on 13 August (in accordance with Art. 23 of the Statute) approved the inclusion of this item on the Agenda and requested the Assembly to devote particular attention to the question of the definition of human rights.

The Consultative Assembly held a general debate on the subject on 19 August and a proposal was made for the establishment of an organization within the Council of Europe to ensure the collective guarantee of human rights. This was referred to the Committee on Legal and Administrative Questions, presided over by Sir David Maxwell Fyfe, with M. Antonio Azara (Italy) as Vice-Chairman and M. Pierre-Henri Teitgen (France) as rapporteur. The report of the Committee was presented to the Assembly by the rapporteur and adopted on 8 September. The Committee on Legal and Administrative Questions took as the basis of its work the Universal Declaration of Human Rights of the United Nations, and listed ten rights which it proposed should be the subject of a guarantee. These will be discussed in greater detail below. The Committee also discussed the inclusion of two further rights: the right to own property and the right of parents to choose the education to be given to their children. The Consultative Assembly, not being in agreement with the proposals submitted by the Committee on these two questions, referred them back to the Committee for further study.

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[1] Cmd. 7686.

Having set out the rights to be guaranteed, the Committee then considered the method of establishing this guarantee. In the first place it proposed that all Member states should bind themselves to respect the fundamental principles of democracy, and to hold free elections at reasonable intervals with universal suffrage and secret ballot; it was then to be left to each signatory state, subject to certain safeguards, to establish the rules by which the guaranteed rights and freedoms should be organized and protected within its territory. The object of the collective guarantee was stated to be 'to ensure that the laws of each State in which are embodied the guaranteed rights and freedoms, as well as the application of these laws, are in accordance with "the general principles of law as recognised by civilised nations" and referred to in Article 38 (c) of the Statute of the International Court of Justice'. As machinery to implement the collective guarantee of human rights, it was proposed to create a European Commission for Human Rights and a European Court of Justice.

Member states might bring any alleged breach of the Convention before the Commission, which would endeavour to settle the matter by conciliation. A similar right of petition was to be granted to private individuals or associations, after exhausting local remedies. If conciliation failed, the Commission itself, or a Member state, might refer the matter to the European Court of Justice, though private parties would have no such right. The Court would take decisions, which would be transmitted to the Committee of Ministers of the Council of Europe, with whom would rest responsibility for further action. This plan, then, to recapitulate, proposed for the first time the institution of an effective remedy for the individual whose rights were infringed by a sovereign state. He would, in his individual capacity, have a direct recourse to an international organ (the Commission) and, though he could not himself appeal to the European Court, a state could be made answerable before the Court if the individual's case were championed by the Commission or by another signatory state.

2. *The drafting of the Convention*

Under the Statute of the Council of Europe, the Consultative Assembly is the deliberative organ of the Council, which has no powers of decision but makes recommendations to the Committee of Ministers, which, as the executive organ of the Council, then acts on them as it thinks fit.[1] Accordingly these proposals were submitted to the Committee with a request that it should cause a draft Convention to be drawn up. The Committee of Ministers considered this Recommendation at its meeting in November 1949 and decided to appoint a Committee of government experts to prepare a draft Convention which might serve as a basis for further discussion by the Committee, 'due attention being paid to the progress achieved in this matter by the competent organs of the United Nations'. In accordance with the decision of the Committee of Ministers, a Committee of government legal experts met in Strasbourg in February and March 1950 and proceeded to prepare a draft Convention, taking as the basis of its work the proposals of the Consultative Assembly. This Committee made considerable progress in the preparation of a draft Convention, but was unable to reach agreement on certain questions (such as the problem whether the rights to be protected should be merely enumerated, or defined in detail) and did not attempt to reach agreement on others (including the creation of a European Court) which it considered to be of a political rather than legal character. It submitted to the Committee of Ministers a report containing a number of alternative texts. The Ministers considered this report at their meeting in April 1950 and decided to convene a meeting of senior officials to take the political decisions necessary as a consequence of the report of the Legal Experts. The Committee of Senior Officials met in Strasbourg in June 1950 and prepared a draft Convention incorporating the greater part of the texts submitted by the Legal Experts. This draft adopted a compromise formula on the question of the enumeration or definition of human rights, and proposed the creation of a European Court with optional jurisdiction. It left undecided a certain number of questions of a largely political nature (such as the right of individual petition) which were referred for decision by the Ministers themselves.

The Committee of Ministers, during its fifth Session at the beginning of August 1950, considered the report of the Senior Officials together with the comments of the Assembly's Legal Committee. On 7 August they adopted a revised text of the draft Convention. This text was considerably weaker than the original proposals of the Assembly, since the right of individual petition was made conditional and the jurisdiction of the Court optional.

This revised text was then submitted to the Consultative Assembly at its Second Session, and again considered by the Assembly's Legal Committee. Its report was approved by the Consultative Assembly on 25 August 1950 and considered by the Committee of Ministers at its Sixth Session in Rome in November of the same year. Once more the Ministers brought with them their legal advisers, who reviewed the amendments proposed by the

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[1] Arts. 13, 22, and 23 of the Statute.

Assembly and undertook a final revision of the text. They were unable to reach unanimous agreement on accepting the majority of the amendments proposed by the Consultative Assembly, with the result that the Convention was finally signed on 4 November 1950 substantially in the form which had been approved by the Ministers in August.

It will be seen from this recapitulation of its history that any defects which may exist in the text of the Convention as finally signed are not due to any lack of diligence and revision on the part of politicians, lawyers, diplomats, and Ministers.

B. *Analysis of the Convention*

1. *The definition of human rights*

The original proposals of the Consultative Assembly listed for inclusion in the European Convention ten rights from the Universal Declaration of the United Nations. These rights, and the corresponding articles of the Universal Declaration, were the following: (1) Security of person (Arts. 3, 5, and 8); (2) Exemption from slavery and servitude (Art. 4); (3) Freedom from arbitrary arrest, detention, or exile (Arts. 9, 10, and 11); (4) Freedom from arbitrary interference in private and family life, home, and correspondence (Art. 12); (5) Freedom of thought, conscience, and religion (Art. 18); (6) Freedom of opinion and expression (Art. 19); (7) Freedom of assembly (Art. 20); (8) Freedom of association (Art. 20, paras. i and ii); (9) Freedom to unite in trade unions (Art. 23, para. iv); (10) The right to marry and found a family (Art. 16). x

When the Committee of Ministers first approved the inclusion in the Agenda of the Consultative Assembly of the original proposal relating to human rights, it requested the Assembly to devote particular attention to the question of their definition. The Assembly, however, contented itself with enumerating them and referring to the United Nations Declaration. The question of defining the rights to be protected was therefore one of the first items for discussion by the Legal Experts when they met in February 1950. Two conflicting views were expressed at this meeting. There was one school of thought which favoured the method of 'enumeration' of human rights, as statements of general principle, which each Member Government would implement within its jurisdiction in accordance with its national legislation and jurisprudence, it being left to each state to establish the methods and conditions of the exercise of the rights and freedoms in accordance with the general principles stated. It was argued that it would be an extremely difficult task to undertake a codification of human rights and that, if this method were to be adopted, it would be better to await the conclusion of the work of the United Nations Commis-

x What about freedom of colour + races?

sion on Human Rights, which was already engaged in this task, even though it had not at the time achieved any general agreement; otherwise the risk would be created of drawing up a Convention which, in this respect, might run contrary to the United Nations Covenant. The main function of the European Convention, it was argued, was the creation of international institutions of control which alone would build up an effective jurisprudence to safeguard human rights in Europe. The opposing point of view was that an essential pre-requisite to any Convention was the precise definition of the rights to be safeguarded and of the permitted limitations on those rights. It was necessary that these definitions should be in the form of a legal text which would make quite clear the nature and extent of the obligations to be assumed by the signatory governments; though the task might be difficult, it should not be insuperable for the relatively small number of countries represented on the Council of Europe, having regard to their common heritage of political liberties and respect for the rule of law. Until the subject-matter was clearly defined, it was argued, it was not possible for a country to know whether or not its existing laws were consistent with the obligations imposed by the Convention, nor could it be ascertained what additional provisions would be necessary for its execution.

The legal experts were sharply divided and unable to reach agreement on either of these conflicting principles as a basis for drafting the Convention. Consequently, they agreed to differ, and decided to submit to the Ministers two alternative texts. The first was based on an enumeration of general principles, reproducing verbatim the relevant texts of the United Nations Declaration, and left to each signatory state the task of establishing the way in which the individual might exercise the rights and freedoms enumerated. The second text contained detailed definitions of the rights and freedoms and of the limitations to which they might be subjected. The Committee took the view that the choice between these two methods was fundamentally political rather than legal, and therefore outside its competence. When the Committee of Senior Officials met in June 1950, it decided in favour of a compromise solution. This involved amalgamating the two texts as drawn up by the Legal Experts. The result corresponded much more closely to the second alternative text based on the principle of detailed definition, though it also included certain features of the first alternative. This compromise text remained substantially unaltered in the final text of the Convention as signed in November.

The human rights and freedoms involved remained the same as those originally proposed by the Assembly in August 1949, and listed above. Their method of treatment, however, differed considerably. In the first place, very uneven treatment was accorded to the different rights to be secured. The Assembly's list of ten separate rights, taken from thirteen different articles of the United Nations Declaration, included as three separate rights: freedom of assembly, freedom of association, and freedom to unite in trade unions. It was found possible to combine all three in the first paragraph of Article 11 of the Convention, which reads: 'Everyone has the right of freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests.' In the drafting of this text there was little difference of view between the two theories of 'enumeration' and 'definition'.

On the other hand, the Assembly listed as one right 'security of person, in accordance with Articles 3, 5, and 8 of the United Nations Declaration'. This became three separate articles (2, 3, and 13) in the European Convention. These provisions well illustrate the difference of approach between the exponents of the 'enumeration theory' and the 'definition theory'—which was fundamentally a difference between the civil law approach and the common law approach. Article 3 of the United Nations Declaration reads: 'Everyone has the right to life, liberty and security of person.' The civilians were content to incorporate these words textually in the draft Convention. The common lawyers, on the other hand, thought that a statement of the 'right to life' necessitated a statement of the circumstances in which someone may be legally deprived of his life, that is to say: in the first place, in the execution of the sentence of a court following a conviction for a crime which involves the death penalty; secondly, when deprivation of life results from the use of force, which is no more than absolutely necessary, in self-defence or in order to effect a lawful arrest, and so on. The results of this method of definition are to be found in Article 2 of the Convention.

Another example is afforded by Article 9 of the United Nations Declaration, which reads: 'No one shall be subjected to arbitrary arrest, detention or exile.' The civilians again proposed to incorporate this verbatim in the draft Convention. To a common lawyer it immediately implied the necessity of defining the circumstances in which detention is lawful. This meant listing the following cases: detention after conviction by a competent court or for non-compliance with the lawful order of a court; arrest or detention to bring a suspect before a magistrate; detention of minors; detention of persons of unsound mind or suffering from infectious diseases, &c. The result was to expand a phrase of two lines into a page of typescript, which may be found in Article 5 of the Convention. Similarly, the right to a fair trial, which is expressed in three lines in the United Nations Declaration, involved under the system of detailed definition inclusion of the following: the presumption of innocence until guilt is proved; the public nature of the hearing, including admission of the press and definition of the circumstances in which it may be excluded; adequate time and facilities for the defence; free legal assistance; production and examination of witnesses; and, when necessary, interpretation (see Art. 6 of the Convention).

This method of detailed definition has, it is submitted, considerable advantages for those who will have to apply the Convention. By reading the final text it is possible to have a much clearer idea of what rights it is intended to secure, and of what limitations may legitimately be imposed on them, than is possible with the very general and therefore very vague enumeration in the United Nations Declaration. It is also to be observed that the United Nations Commission on Human Rights, in working out its draft Covenant,[1] introduced a far greater measure of precision than was to be observed in the original Declaration. Nevertheless, any attempt at exhaustive definition always carries with it the danger of unintentional omissions which may later be construed as deliberate exclusions. Only the future will show whether this pitfall has been successfully avoided.

2. *The European Commission of Human Rights*

The next task which fell to the drafters of the Convention was that of devising some machinery for the enforcement of the rights which they had so carefully defined. They accepted the idea of the Consultative Assembly that a European Commission should be created for this purpose, as an impartial, international organ to which complaints could be made in the event that any Member state failed to secure to anyone 'within its jurisdiction'[2] the rights and freedoms defined in the Convention. The Assembly's proposals on the constitution and functions of the Commission were accepted without major alterations by the two committees which subsequently elaborated the text of the Convention, and therefore remain substantially intact.

The Commission is to consist of a number of members equal to the number of High Contracting Parties and no two members of the Commission may be nationals of the same state (Art. 20). As a result, each High Contracting Party is likely to be represented on the Commission by one of its nationals, though the possibility of nationals of non-Member states being appointed is not excluded. The members of the Commission are to be elected by the Committee of Ministers from a list of names prepared by the Consultative Assembly. In order to avoid the possibility that a group of representatives in the Assembly should 'force the hand' of the Committee of Ministers, it is provided that each group of representatives shall put forward three candidates of whom two at least shall be its own nationals (Art. 21). The principal function of the Commission is to investigate alleged breaches of the Convention, for which purpose the states concerned will furnish all necessary facilities, and to secure, if possible, a friendly settlement of the matter (Art. 28). As the whole Commission will consist of fifteen members, its function of friendly settlement is to be performed by a Sub-Commission of seven members, of whom each of the parties concerned may appoint one, and the remainder are to be chosen by lot (Art. 29). If a friendly settlement is achieved, a brief report will be prepared and published (Art. 30). If the attempt at friendly settlement fails, the Commission as a whole will draw up a report and state its opinion as to whether the facts disclose a breach of its obligations by the state concerned. In order to encourage frank discussion and facilitate the search for truth, the Commission is to meet *in camera* (Art. 33), and individual opinions may be stated in the report (Art. 32).

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[1] See *supra*, p. 145, n. 5.

[2] Under Art. 1 of the Convention the High Contracting Parties undertake to secure the rights and freedoms defined in Section I of the Convention 'to everyone within their jurisdiction' and not merely to their own nationals. This very comprehensive phrase was quite deliberately used in preference to the more restrictive expression 'all persons residing within their territories' which had been proposed by the Legal Committee of the Consultative Assembly.

A major problem then arises as to the action that should be taken to enforce respect for the Convention, when the attempt at friendly settlement has failed. One possible solution is reference to a European Court, to which further attention will be given below. But, since a number of governments indicated their opposition to the idea of a European Court, it was necessary to devise some other solution. This was found in an agreement that the matter should be referred to the Committee of Ministers of the Council of Europe. Accordingly, Article 31 provides that, when negotiation has failed, the Commission should forward its report to the Committee of Ministers, making such proposals as it thinks fit. In default of a reference within a period of three months to the Court of Human Rights, it is then for the Committee of Ministers to decide, on the basis of the Commission's report, whether a violation of the Convention has been committed, and, if so, what measure shall be taken. The High Contracting Parties undertake to regard as binding on them any decision of the Committee of Ministers in this respect (Art. 32). It is of particular interest that such decisions of the Committee of Ministers are to be binding and taken by a two-thirds majority of the members entitled to sit on the Committee, since under Articles 15 and 20 of the Statute of the Council of Europe the powers of the Committee are only to make recommendations to governments, and for all important decisions of the Committee the unanimous vote of those present and voting is required. This unanimity rule has been much attacked by the Consultative Assembly, but its retention has been insisted on by the Ministers. It is the more significant that they have agreed to waive it when discharging their functions under the Convention on Human Rights, and that they have assumed in this sphere the power of taking binding decisions.

3. *Right of individual petition*

Under Article 24 of the Convention, any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party. The value of this provision, however, is limited. In international agreements which regulate the conduct of states *inter se*, it is, of course, highly desirable to provide for a tribunal before which one state can arraign another which has caused it injury through non-compliance with the terms of the agreement. However, when the object of the agreement is to protect not states but individuals, the real party in interest, if a breach of the agreement occurs, is the individual whose rights have been denied. It is therefore this individual who stands in need of a remedy, and the remedy he needs is a right of appeal to a tribunal which is competent to call the offending party to account.

It may be argued—and was indeed argued when the Convention was being drafted—that only states are recognized as subjects of international law. The weakness of this argument in relation to human rights is to be found in practical considerations of common sense. The object of the Convention on Human Rights is to protect the rights of the individual citizen—of the man on the Clapham omnibus. If it should happen that his rights, as defined in the Convention, are violated, this violation will in all probability be committed by his own government. Under the classic concept of international law, this individual has no *locus standi* on the theory that his rights will be championed by his government. But how can his government be his champion, when it is *ex hypothesi* the offender? Perhaps it may be argued that another government will take up the cudgels on his behalf and lodge a complaint against his government. This is possible. But few Foreign Offices in these times of international tension have the inclination gratuitously to pick a quarrel with an ally over the treatment accorded by the latter to one of its own nationals; nor are they likely to have the information necessary to do so, even if they should have the inclination.

For these reasons, the original proposals of the Consultative Assembly of August 1949 included an individual right of petition to the international Commission or, as the Legal Committee preferred to call it, 'a right of individuals to seek a remedy directly'. This right was made subject, of course, to the previous exhaustion of local remedies. The Committee of Legal Experts added to the statement of the local remedies rule the words 'according to the generally recognised rules of international law', in order to refer to the jurisprudence according to which improper delay by national tribunals is deemed to be an exhaustion of local remedies. During the negotiations, however, a difference of opinion arose as to the desirability of including the right of individual petition, the fear being expressed that this right might easily lead to abuse, particularly in the interests of subversive propaganda. To guard against this danger express provisions were added to the effect that the Commission would not entertain petitions which were anonymous, manifestly ill-founded, or an abuse of the right of petition (Art. 27). Nevertheless, the objections to the right of individual petition were maintained. The Legal Committee of the Assembly stressed that in its view it was essential that this right of individuals to seek a direct remedy should be preserved, but the Committee of Ministers in August 1950 was unable to obtain unanimous agreement in this sense and decided, as a compromise solution, to make this right optional, that is to say, subject to an express declaration on the part of the government concerned that it recognized the competence of the Commission to receive petitions from individuals.

When the Assembly received the Ministers' draft Convention in August 1950, it was particularly concerned at this uncertain treatment of a right the maintenance of which it regarded as essential. In an endeavour to reinstate this provision, while taking account of the reluctance of some governments to accept it, the Assembly proposed that the procedure should be reversed and that the right of individual petition should obtain in all cases, unless the government concerned had made an express declaration to exclude it. The Ministers, however, found this amendment unacceptable and retained the formula which they had approved in August, by which the right of individual petition only exists when it has been expressly accepted. Article 25 contains the definitive text in this sense and also provides that six declarations of acceptance are required before the right of individual petition can be exercised.

4. *The European Court of Human Rights*

The original proposals of the Consultative Assembly included the creation of a European Court of Human Rights to adjudicate infringements of the Convention which could not be settled by the Commission. The Assembly proposed that the Court should consist of nine members, in order to make it clear that it would be a Court of Justice and not a political council of Member states. When the Convention was being drafted, however, it was decided to increase the number of judges so as to make it equal to that of the High Contracting Parties. It was felt that, if the number of judges was limited to nine, in all probability nationals of the major Powers would be elected to the Court, with the result that the chance of the smaller states being represented would be slight. In order not to put them at this disadvantage, the total number of judges was increased. At the same time it was felt that a Court consisting of thirteen or fifteen judges would be unwieldy; provision was therefore made that cases should be heard by a chamber of the Court consisting of seven judges (Art. 41). The judge who is a national of any state party to the action will sit as a member of the Chamber *ex officio*; in the case of a state which does not have a judge of its nationality on the Court, a person of its choice shall sit in the capacity of judge. The names of the other judges are to be chosen by lot by the President before the opening of each case.

A serious difference of opinion, however, arose on the fundamental question whether a European Court of Human Rights should be created at all. The representatives of a number of countries were definitely opposed to the creation of a Court, on the ground that the needs of the Convention would be covered by the institution of the Commission and the reference of its reports to the Committee of Ministers. Other representatives, on the other hand, felt that only the creation of an impartial tribunal would be able to ensure the efficient protection of human rights. However, since the proposal to create a Court with compulsory jurisdiction did not receive the support of the majority, it was not included in the draft Convention. A compromise solution was then sought, which would involve the principle of optional jurisdiction. The Court would have jurisdiction only in respect of those states which expressly accepted it. For this purpose they might make a declaration by which they would agree to accept the jurisdiction of the Court as compulsory in all matters arising out of the Convention. This then gave rise to the further question whether the membership of the Court and the burden of its expenditure should be limited to those states which made such declarations or whether, on the other hand, the Court should be an organ of all the High Contracting Parties, on which they might all have their nationals as judges, even though its jurisdiction was accepted only by a limited number of states. There was a strong feeling that the creation of a European Court for only a limited number of Member states would be contrary to the basic aim of the Council of Europe, and would constitute a factor of division rather than of union between Member states. It was therefore decided to set up a European Court as an organ of the Council of Europe as a whole; all Member states would then participate in the election of the judges, and in the expenses of the Court. At the same time the jurisdiction of the Court would be optional and only apply to those states which expressly accepted it.

Such acceptance may take place in different ways. Under Article 46 any High Contracting Party 'may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention'. Such declarations may be made unconditionally or on condition of reciprocity. Independently of such declarations, however, any state may consent to the jurisdiction of the Court in a particular case, either as plaintiff or defendant. It is therefore the more appropriate that all High Contracting Parties, that is to say, all Members of the Council of Europe, are 'members' of the Court—in the sense of participating in its creation and maintenance—since all signatories of the Convention may avail themselves of its jurisdiction, even if only a limited number accept it as compulsory. This solution would appear to be a wise one, particularly in view of the fact that a European Court, once created, is likely to be invested with powers not only under the Convention on Human Rights, but also in connexion with other European regional arrangements. Judicial organs are currently under contemplation in the Schuman Plan and in other plans for 'Specialised Authorities'—international organs created by a number of European states with defined functions in particular specialized fields. It is as yet too early to say whether one European Court will be invested with the judicial functions envisaged under all such special arrangements, but it seems natural to hope that reasons of policy as well as grounds of economy will lead to the concentration of these judicial functions in one European Court.

The decision to make the Court an organ of all Member states led to the need for specifying the minimum number whose participation would be required to make it effective. It would obviously be absurd to create a European Court in whose constitution fifteen states would be partners if its jurisdiction were only to be accepted by two or three. Considerable discussion took place as to the minimum number required, and the Committee of Ministers in August 1950 fixed on the figure of nine. On the proposal of the Consultative Assembly, the Committee of Ministers agreed in November of the same year to reduce this figure to eight; this is the solution adopted in Article 56 of the Convention, which expressly provides that no case can be brought before the Court until eight declarations have been made accepting its compulsory jurisdiction; only then will the first election of the judges be held.

The method of their election was worked out as follows. The Assembly originally proposed election by the Committee of Ministers and by the Consultative Assembly by an absolute majority of votes cast in each of these bodies. This would generally follow the method of election of the judges of the International Court at The Hague, which is by the General Assembly and the Security Council (Art. 4 of the Statute). The legal experts retained this system, adding that elections should be based on a list of persons nominated by the High Contracting Parties, each party nominating three candidates. The final text of the Convention, however, provides for election by the Consultative Assembly alone. This procedure to some extent establishes an equilibrium between the powers of the Committee of Ministers to elect the members of the Commission and those of the Assembly to elect the members of the Court. The judges are to be elected from lists of persons nominated by the Member states; each party nominating three candidates, of whom two at least shall be its nationals (Art. 39). This procedure on the one hand makes it possible for judges to be elected who are not nationals of Member states, and, on the other hand, makes it impossible for a Member state to force the hand of the Assembly by nominating only one national, who would then have to be elected unless that state were to be deprived of representation on the Court. In view of the probability that the Court will not be in continuous session, it is provided that the remuneration of the judges shall be paid on a daily basis, to be determined by the Committee of Ministers (Art. 42), but there is no provision comparable to that of the International Court of Justice whereby the judges may not exercise any other functions.

The jurisdiction of the Court depends in the first place, as has been stated above, on express declarations by Member states that they accept its jurisdiction as compulsory (Art. 46). Such declarations may be made unconditionally, or on condition of reciprocity on the part of several or certain other High Contracting Parties, or for a specified period. Individuals do not have any right of access to the Court. Cases may be brought only by High Contracting Parties or by the Commission (Art. 48). A problem that may arise, to which no clear answer is given in the Convention, is the question whether the Commission may bring a case before the Court against a High Contracting Party which has accepted the jurisdiction of the Court on condition of reciprocity. Prima facie, the answer would appear in the negative because the Commission itself cannot accept or decline the jurisdiction, so that no reciprocity exists. On the other hand, it may be argued that the condition of reciprocity only relates to cases brought by other High Contracting Parties and does not affect the ability of the Commission to bring a case before the Court, since the Commission is *sui generis* and the right of the Commission to refer cases to the Court is an essential part of the procedure established by the Convention which cannot be excluded in default of a clear intention to exclude it. Should such a case arise, it will be for determination by the Court itself, since Article 49 provides that in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

5. *Application to Colonial Territories*

Another contentious issue during the course of the negotiations was the question whether the Convention should apply to the overseas and colonial territories of the High Contracting Parties. One view held was that it should be so drafted as to apply automatically to such territories unless they were specifically excluded; the other view was that it should only apply in the first place to the metropolitan territories, but be capable of extension to overseas territories by express declaration. The protagonists of the first view were anxious to secure as extensive an application of the Convention as possible and felt that the governments were less likely to exclude the colonial territories if such exclusion involved a public declaration. The advocates of the second view maintained that certain countries, including particularly the United Kingdom, could not constitutionally apply the Convention to their colonial territories without first consulting the colonial legislatures. Therefore, if extension to the colonies were automatic, it would not be possible for the governments of these countries to ratify the Convention before consulting a large number of separate legislatures to obtain their approval. Consequently, the practical result of the formula proposed would be to delay the ratification of the Convention by some of the principal signatories for such period as would be necessary for these consultations to take place—which might mean a very considerable delay. Belgium, France, the Netherlands, and the United Kingdom were all directly interested in this question, which, of course, had an important political aspect. The matter was referred for decision to the Committee of Ministers itself, which, in August 1950, decided in favour of an article requiring express declarations by the High Contracting Parties before the Convention would extend to their colonial territories. This article provoked a lively discussion in the Consultative Assembly during the course of its examination of the draft Convention later in the same month, and a strong feeling was expressed by some members in favour of an automatic extension of the Convention to colonial territories. The Assembly adopted a Recommendation[1] calling on the Ministers to delete the 'colonial clause' which they had incorporated in their draft, which would mean that the Convention would apply automatically to overseas territories. This Recommendation was considered by the Committee of Ministers in November, but was not found acceptable, with the result that Article 63 remains in the final text as approved by the Ministers in August, that is to say, requiring an express declaration before the Convention will apply to colonial territories.

6. *Additional rights*

When the Assembly reviewed the draft Convention proposed by the Committee of Ministers in August 1950, it recommended the addition of three rights not included in the Ministers' draft. These were the right to own property, the right of parents to choose the education of their children, and the so-called 'political liberties clause'. The Legal Committee's original proposals of August 1949 had included the first two of these rights by reference to Articles 17 and 26 of the United Nations Declaration, but the Assembly had referred them back to the Committee for further study.

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[1] This Recommendation was not the result of a proposal by the Legal Committee, whose Chairman opposed it during the debate. It was adopted by a narrow majority of 46 votes to 37.

A drafting sub-committee of the Legal Committee produced during the year a large number of texts. Finally, in August 1950, the following proposals were adopted:

Right of Property:

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. Such possessions cannot be subject to arbitrary confiscation. The present measures shall not however be considered as infringing, in any way, the right of a State to pass necessary legislation to ensure that the said possessions are utilised in accordance with the general interest.'

Right to Education:

'Every person has the right to education. The function assumed by the State in respect of education and of teaching may not encroach upon the right of parents to ensure the religious and moral education and teaching of their children in conformity with their own religious and philosophical convictions.'

It was obvious that any clause designed to guarantee the individual's enjoyment of his possessions and protect him from arbitrary confiscation would be unacceptable to Socialist governments unless it was made quite clear that this would not prevent the state from nationalizing private property. At the same time, it is a matter of some delicacy to draft a clause which will permit a democratic Socialist government to nationalize private property 'in accordance with the general interest' but will not allow a totalitarian government to confiscate private property for the benefit of the State in accordance with a policy which it claims to be in the general interest, even though most democratic countries would regard it as discriminatory. The text reproduced above was an attempt to steer a course between the Scylla of nationalization and the Charybdis of confiscation. It succeeded in obtaining the approval of the Consultative Assembly, and was transmitted to the Ministers as a Recommendation.

The right to education trod on equally delicate ground. In modern society, where the education of children is primarily—at least in most countries—the function of the state, the right of parents to choose the education to be given to their children involves as a corollary the duty of the state to furnish education in accordance with the individual convictions of its nationals. How far is this duty to be carried? Must schools of all denominations be provided in every village? If not, where is the line to be drawn? These questions immediately evoke in many continental countries the long and bitter dispute between Church and State over education and the support of religious schools. They also raise a newer, and even more controversial question. If parents have the right to choose the education to be given to their children, have communist parents in a non-communist state the right to have their children educated in the doctrines of Marx and Lenin? Is a government which is fighting communism at home, and perhaps abroad, to nurture young communists within its frontiers?

A passing reference to this problem was made in the Consultative Assembly, and the Chairman of the Legal Committee explained that it was not the intention of his Committee that the Convention should guarantee to communists the right to educate their children in accordance with their beliefs. While this must be accepted as an authoritative statement of the intention of the Committee, it does not seem conclusive as an interpretation of the text which the Committee had proposed.

Political Liberties:

The Assembly also recommended to the Committee of Ministers the inclusion of the following article:

> 'The High Contracting Parties undertake to respect the political liberty of their nationals and, in particular, with regard to their home territories, to hold free elections at reasonable intervals by secret ballot under conditions which will ensure that the government and legislature shall represent the opinion of the people.'

This was, in fact, a revised and somewhat weakened version of an article which had been included in the original proposals of the Assembly in August 1949. The latter, however, had been deleted during the preparation of the Convention on the ground that it related to questions of a constitutional or political character which were outside the framework of a Convention whose aim was to protect the fundamental rights of individuals. Both the Legal Committee of the Assembly and the Assembly itself felt very strongly about this suppression of a right which one representative—M. Rolin of Belgium—described as the most important guarantee in the whole Convention. The revised text, quoted above, was adopted unanimously by the Assembly in August 1950 with a recommendation that it should be included in the final Convention.

This text nevertheless raised difficulties. Clearly, all Member states of the Council of Europe are advocates of political liberties. *Ex hypothesi* they are, like Disraeli, on the side of the angels. The Statute of the Council of Europe reaffirms the High Contracting Parties' 'devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy'. Again, under Article 3 of the Statute 'every Member of the Council of Europe must accept the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'. It is, however, quite a different question to draft a short paragraph guaranteeing political rights to individuals. The formula adopted by the Assembly of holding 'free elections at reasonable intervals by secret ballot under conditions which will ensure that the government and legislature shall represent the opinion of the people' has an initial attraction, but when closely examined might well be construed as committing all signatory governments to a system of proportional representation. In view of this, it is not surprising that when the Committee of Ministers came to consider the proposals of the Assembly on the three rights of property, education, and political liberty as part of a heavy Agenda at a two-day Session in Rome, they did not find these texts acceptable in the form presented to them. They therefore decided to refer them for further study to their legal experts. They were then faced with the choice of deferring signature of the Convention until these proposals had been more carefully examined, or, on the other hand, of signing the Convention without these articles, which would then be left for incorporation in a Protocol at a later date. In view of the extended negotiations which had already been necessary to produce the text of the Convention as it then was, there was unanimous agreement among the Foreign Ministers that it was preferable to sign the Convention immediately without these additions and to conclude a Protocol at a later date, if agreement thereon proved possible. At the time of writing this article, it is anticipated that a meeting of government legal experts will be held early in 1951 to attempt this task.

C. *Conclusions*

The European Convention on Human Rights is an imperfect document, but it represents a big step forward. It constitutes a great advance on the Universal Declaration of Human Rights of the United Nations, since the latter amounted in the last analysis to nothing more than an expression of intentions, whereas the European Convention contains specific legal commitments which have been accepted by fifteen governments. The most important innovations which it was hoped that the European Convention would contain were two: the granting to individuals whose rights are denied of direct access to an international organ capable of protecting them; and the institution of a judicial body on the international plane competent to sit in judgment on national governments. Unfortunately, it was not politically possible at this juncture to obtain unanimous agreement on the acceptance of these two provisions. Each of them remains optional in the sense that it is not a necessary consequence of signature of the Convention, but depends on an express supplementary declaration by the states concerned.

Nevertheless, a distinct advance has been made by the creation of the

Commission, to whose jurisdiction all signatory states are automatically subject at the instance of the other High Contracting Parties, by the provision that the Committee of Ministers can take decisions by a two-thirds majority on reports of the Commission, and by the creation of the European Court of Human Rights even with optional jurisdiction.

For these reasons the Convention can be welcomed as an important development, and few of those who took part in its preparation were under any illusions that it represented more than a first step. At the ceremony of signature in Rome the Irish Foreign Minister, Mr. MacBride, stated: 'The present struggle is one which is largely being fought in the minds and consciences of mankind. In this struggle, I have always felt that we lacked a clearly defined charter which set out unambiguously the rights which we democrats guaranteed to our people. This Convention is a step in this direction.' The French Minister for Foreign Affairs, M. Schuman, stated frankly: 'This Convention which we are signing is not as full or as precise as many of us would have wished. However, we have thought it our duty to subscribe to it as it stands. It provides foundations on which to base the defence of human personality against all tyrannies and against all forms of totalitarianism.' Indeed, the Preamble to the Convention itself recites that the signatory governments are resolved 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

It is hoped that a considerable number of the governments which signed the Convention will accept the right of individual petition and the compulsory jurisdiction of the Court. The success and importance of the Convention will depend largely on the number of states which are prepared to express their faith in the rule of law by taking these two further steps. The peculiar merit of the Council of Europe is that the parliamentarians who sponsored this proposal at Strasbourg can also, in their own Parliaments, use their influence to secure not only the ratification of the Convention but also the acceptance of the two further commitments which would make of the Convention an effective instrument for the protection of human rights and freedoms.

THE LEGAL NATURE OF THE TRUSTEESHIP AGREEMENTS

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I. *The Text of the Charter*[1]

(*a*) *The question of the voluntary character of the trusteeship system*

ARTICLE 77 (1) (*c*) of the Charter provides that the trusteeship system '*shall* apply to . . . territories *voluntarily* placed under the system by states responsible for their administration'. The word 'voluntarily' in this provision may be taken, and has been taken, to suggest that the application of the system to the other categories of territories referred to in the paragraph, namely '(*a*) territories now held under mandate [and] (*b*) territories which may be detached from enemy states as a result of the Second World War', is not voluntary but obligatory. However, although the paragraph opens with an indication that the system 'shall' apply, this imperative is immediately softened by a qualifying clause to the effect that it 'shall' so apply [*scilicet* only] to such territories of the categories mentioned 'as may be placed thereunder by means of trusteeship agreements'. The inference that the application of the system is in every case voluntary is strengthened by the circumstance that paragraph (2) of the same article provides that 'it shall be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the system and upon what terms'. Additional evidence for the opposite thesis—that the application of the trusteeship system is in some cases obligatory—is to be collected from Article 80, paragraph (1) of which provides that 'except as may be agreed upon in individual trusteeship agreements made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of international instruments to which Members of the United Nations may respectively be parties'. That this paragraph refers to the various interests involved in the mandates system is unmistakable. It is also possible that it may also refer to title by occupation and conquest to enemy territory.[1] At first sight it merely confirms the hypothesis of the completely voluntary character of the trusteeship system. But it is followed by a second paragraph whereby it is provided that 'paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandates and other territories under the trusteeship system as provided for in Article 77'. When read together the two paragraphs thus indicate that the intention and expectation of the draftsmen was that the trusteeship system *should* apply to mandated 'and other' territories and that the mandates system should not lapse before it was made so to apply.[2]

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[1] The writer has sought elsewhere to analyse the ambiguities of Chapter XII of the Charter and to show that the draftsmen, whose looseness of language may be accounted for by the circumstance that they used as a basis for discussion a draft discontinuous with the Dumbarton Oaks Proposals, envisaged a trusteeship agreement, somewhat vaguely as a species of interstate treaty confirmed by an appropriate organ of the United Nations. See this *Year Book*, 26 (1949), pp. 108, 122–8. Note in especial the view there expressed that the 'agreement' upon terms of trusteeship of 'the States directly concerned' required by Art. 79 would be more correctly termed 'consent' and may be unilateral.

(*b*) *The identity of the parties to trusteeship agreements*

Nevertheless, it has been rightly pointed out that Article 77 is concerned only with, as it were, the geographical range of the new system[3]—a conclusion confirmed by the fact that the next article, Article 78, is concerned with the limitation of that range. For it is provided there that the system 'shall not apply' to territories which have become Members of the United Nations. It is only in Article 79 that the question of trusteeship agreements proper is reached. It is stipulated there that 'the terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85'. This language is perhaps unfortunate. For in the first place it leaves open the question as to who are the parties to the treaties it envisages as requisite for the application of the trusteeship system to any particular territory. In the second place it gives some ground —as do also Articles 79 (2) and 82—for the drawing of a distinction between a trusteeship agreement and agreement upon 'terms of trusteeship'. It might thus be thought that, although the 'states directly concerned' were required to agree upon the terms—the general conditions as it were—of trusteeship with respect to a territory, these states need not necessarily be parties to the trusteeship agreement for that territory. The reference to Articles 83 and 85, which speak of 'approval of *the terms* of the trusteeship agreements' by the Security Council or the General Assembly as the case may be, does not entirely exclude the possible distinction.[4]

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[1] See *infra*, p. 169.

[2] Cf. Goodrich and Hambro, *The Charter of the United Nations, Commentary and Documents* (2nd ed. 1949), pp. 434–5.

[3] Cf. Kelsen, *The Law of the United Nations* (1950), p. 574.

[4] The substitution in the equally authentic French text of the phrase 'Les termes du régime de tutelle, pour chacun des térritoires . . . feront l'objet *d'un accord* entre les états intéressés . . .' for the English 'The terms of trusteeship shall be agreed upon . . .', as also the use in the French version of Art. 77 (2) of the expression 'un accord ultérieur déterminera . . .', seem, however, to

As for the Organization itself, when not an administering authority, it is not possible to maintain with any confidence that the United Nations is, in the Charter, envisaged as a party to the trusteeship agreements. If that had been intended, it could scarcely have been stated more obscurely. That it was not so intended is sufficiently obvious both from the *travaux préparatoires* and the general scheme of the trusteeship system which, according to Article 75, the United Nations 'shall establish *under its authority* for the administration *and supervision*' of territories within its scope. The question thus remains open as to who the parties are. Some imperfect assistance is provided by Article 81, where it is laid down that 'the trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory' and that 'such authority, hereinafter called the administering authority, may be one or more states or the Organization itself'. But even here (leaving aside in any event the prima-facie exceptional case where the Organization is the administering authority) there is no necessary implication that the administering authority must be a party to the trusteeship agreement. The fact that Article 84, which relates to the integration of trust territories into the general security system of the Charter, in laying a duty on the administering authority to ensure this, does so not by providing that 'the trusteeship agreement shall in each case enable . . .' but that 'to this end the administering authority *may* make use of volunteer forces . . .' perhaps implies that such authority will not so be a party.[1]

(*c*) *Who can place a territory under the trusteeship system?*

One possible approach to an answer to this question is to ask what authority has capacity to place a territory under the trusteeship system. The further question, which, incidentally, may throw light also on the problem as to whether or not the trusteeship system is exclusively voluntary in its application, must be answered in the first instance by reference to the Charter. This document gives only partial indications as to what the answer may be. As already mentioned, it provides in Article 77 (1) (*c*) that the trusteeship system 'shall' apply to 'territories voluntarily placed [thereunder] by states responsible for their administration'. The plural form of that provision clearly follows from the fact that Article 77 is dealing with 'categories' of territories. The inference is that a single state responsible

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dispose of any such suggestion. Cf. also the French text of Art. 81, which speaks of 'les *conditions* dans lesquelles le territoire sera administré' as opposed to the English 'terms'. As to the possibility of a somewhat similar distinction between a general 'subsequent agreement' on the whole range of the trusteeship system within Art. 77 (2) and individual 'trusteeship agreements', see *infra*, p. 168, n. 4.

[1] See this *Year Book*, 26 (1949), pp. 108, 122–8.

for the administration of a territory possesses exclusive capacity to place the latter under the system.[1] It may be objected that mere responsibility for administration does not give sufficient title to dispose of a territory in general international law.[2] There may nevertheless be several explanations for the phraseology employed. Thus the draftsmen may have been merely guilty of loose language, in which case what they have provided will only apply to the normal circumstance—where a state is responsible for the administration of a territory because it has sovereignty over it. Or, alternatively, they may have intended that the Charter should override general international law and to mean what they have in fact said, namely, that administrative responsibility should give sufficient title to place a territory under the trusteeship system. The consequences of such a prima-facie departure from general international law amount to no more than the restriction of the administration's freedom of action by the observance of a 'trust' in favour of the inhabitants. Such an intention on the part of the draftsmen would be by no means unreasonable.

In the second place the Charter indicates in Article 79 that the 'states directly concerned', whose 'agree[ment] upon the terms of trusteeship' for any territory is required, shall 'include the mandatory power in the case of territories held under mandate by members of the United Nations'. The acceptance of this as an indication of the identity of the parties to trusteeship agreements may depend, of course, upon acceptance of the thesis that 'agree[ment] upon the terms of trusteeship' means the same thing as the conclusion of a trusteeship agreement. It may not do so, however. But if it be conceded only that a mandatory Power is a necessary party to 'agreement upon the terms of trusteeship', it may be asked who has capacity to place a mandated territory under the trusteeship system. The question is still relevant if the alternative thesis is accepted. For the Charter makes a distinction between mandatory Powers which are Members of the United Nations and others. The use of the word 'including' also implies that, even when the mandatory Power is such a 'Member' there should be other parties.[3] Moreover, even if capacity in terms of the Charter be established, there remains the question of the compatibility of the solution with general international law.

(*d*) *The opinion of the International Court of Justice*

It is unprofitable to speculate concerning these questions on the basis of bare text of the Charter. For it is evident that that text is not clear. Mere logic can only produce from it wholly untenable conclusions—such as that the only trusteeship agreement in fact achieved which conforms to the text is that for Nauru, by reason of the fortuitous circumstance that the original mandate for that territory was conferred upon 'His Britannic Majesty' and that the constitutional complexities of the Commonwealth cause the arrangements for its administration to present a wholly illusory appearance of an interstate treaty.[1] Moreover, the text has been authoritatively interpreted by the International Court of Justice in its Advisory Opinion on the Status of South-West Africa.[2]

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[1] Cf. Kelsen, op. cit., p. 583, n. 8 for the suggestion, anent the phrase 'the states directly concerned', that 'A plural cannot be interpreted tc mean the singular'. On this point see *supra*, p. 164, n. 1 and *infra*, p. 181.

[2] Cf. Kelsen, op. cit., p. 573.

[3] See the preceding note.

The Court was directly presented with one aspect of the first problem adverted to above: the question as to whether the trusteeship system applies to any territories obligatorily. For it was asked this question in reference to a specific territory in respect of which a mandate had been given to a state which became a Member of the United Nations. By eight votes to six it returned the answer 'that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to place the territory under the Trusteeship System'.[3] The reason given by the majority for this view was that the language used in Articles 75 and 77 was permissive; that both articles referred to subsequent agreements by which the territories within their scope may be placed under the Trusteeship System. The Court said: 'an "agreement" implies consent of the parties concerned. . . . The parties must be free to accept or reject the terms of a contemplated agreement. No party can impose its terms on the other party.' The Court regarded the word 'voluntarily' in Article 77 (1) (*c*) as having been inserted 'out of an abundance of caution and as an added assurance as to freedom of initiative of States', and as being incapable of overriding 'the principle derived from Articles 75, 77, and 79 as a whole'. Of Article 80 (2) it likewise said: 'There is nothing to suggest that the provision was intended as an exception to the principle derived from Articles 75, 77 and 79. The provision is entirely negative in character and cannot be said to create an obligation to negotiate and conclude an agreement. Had the parties to the Charter intended to create an obligation of this kind for a mandatory State, such intention would necessarily have been expressed in positive terms.' That paragraph did not even create an obligation to negotiate, rather than conclude, a trusteeship agreement, so far as mandatory states were concerned, for 'it is not limited to negotiations only' and was, moreover, not limited to territories referred to in Article 77 (*b*). The argument that, unless it applied obligatorily to mandated territories, the trusteeship system would have no more than a theoretical existence was dismissed as unconvincing.[4]

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[1] See *infra*, p. 180.

[2] *I.C.J. Reports*, 1950, p. 128.

[3] Ibid., p. 144.

[4] Ibid., pp. 139–40. Two incidental points of some interest emerge here: (1) that the Court impliedly recognized the binding force of a *pactum de contrahendo* or agreement to agree in

The court's opinion does not relate directly to the territories within Article 77 (1) (*b*)—territories to be detached from enemy states as a result of the Second World War. But the majority did express, as it were *obiter*, the view that Article 80 (2) 'refers not merely to territories held under Mandate, but also to the territories mentioned in Article 77 (*b*) and (*c*)'.[1] If this is so it may well be asked, what possible reason there could be for providing: (1) in Article 77 (1) (*c*), that a state might bring its own territory within the system voluntarily; and (2) in Article 80 (1) that the rights of such states therein should not justify delay in doing this. The Court did indeed express the opinion, and that unanimously, that 'the provisions of Chapter XII of the Charter are applicable to the Territory of South West Africa in the sense that they provide a means by which the Territory may be brought under the Trusteeship System', and that 'the Union of South Africa acting alone has not the competence to modify the international status of the Territory of South-West Africa, and that the competence to modify the international status of the Territory rests with the Union of South Africa acting with the consent of the United Nations'.[2] These points were made separately and the first of them was arrived at without discussion.[3] In other words, the question of capacity to place a mandated territory under the trusteeship system was answered, in the context of the question as to how and in what manner Chapter XII of the Charter applied to South-West Africa, exclusively in terms of the law of the Charter, and not in terms of general international law. In the context of the different question as to whether the Union of South Africa had competence to modify the status of the territory and, if not, where such competence lay, the same answer was given on the same basis. In fact, the answer was somewhat more extensive. For, the Court said: 'Articles 79 and 85 of the Charter require that a Trusteeship Agreement be concluded by the Mandatory Power and approved by the General Assembly before the International Trusteeship System may be substituted for the Mandates System. . . . By analogy, it can be inferred that the same procedure is applicable to any modification of the status of a Territory under Mandate which would not have for its purpose the placing of the territory under the Trusteeship System.'[4] But the incompetence of the mandatory, acting alone, to modify the status of the territory was expressed to result 'from the international rules regulating the rights, powers and obligations relating to the administration of the Territory and the supervision of that administration, as embodied in

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international law, though it denied that Art. 80 constituted such an agreement; (2) that the Court took the phrase 'subsequent agreement' in Art. 77 (2) to refer to some more general process of agreement than the conclusion of a trusteeship agreement.

[1] *I.C.J. Reports*, 1950, pp. 128, 140.

[2] Ibid., p. 144.

[3] Cf. ibid., pp. 139, 140, 141.

[4] Ibid., pp. 141–2.

Article 22 of the Covenant and in the Mandate'.[1] In other words, the reasons why the mandatory could not dispose of the territory unilaterally was that it had only a limited interest and that the provisions of the mandate constituted a status. The Court, both in this context and elsewhere, regarded the mandates system as still alive.[2] It held Article 80 (2) of the Charter itself to presuppose 'that the rights of States and peoples shall not lapse automatically on the dissolution of the League of Nations'.[3] However, it based its conclusion that the United Nations could supply the defective capacity of the mandatory exclusively on considerations relating to the real status of the territory. It held that notwithstanding the fact that the consent of the League Council was requisite to the modification of the mandate and that Article 22 of the Covenant could only be amended in accordance with the general procedure for the amendment of that instrument, the inapplicability of these methods of modification following the dissolution of the League did not permit one to 'conclude therefrom that no proper procedure exists for modifying the international status of South-West Africa'.[1] However, despite the fact that all judges agreed with the conclusion, some of them did not accept the next step in the reasoning. For, the majority went on: 'Article 7 of the Mandate, in requiring the consent of the Council of the League of Nations to any modification of its terms brought into operation for this purpose the same organ which was invested with powers of supervision in respect of the administration of the Mandates. In accordance [with the earlier conclusion of the majority that the Union of South Africa had the obligation inter alia to make reports and present petitions to the Trusteeship Council in substitution for the appropriate League organs] those powers of supervision now belong to the General Assembly.' Accordingly by analogy it could be concluded that the General Assembly could supply the deficient capacity of the mandatory Power to modify the status of the territory.[4] Judges McNair and Read did not agree that South Africa had the obligation in question.

For the rest, the language used by the Court indicates that it conceived of a trusteeship agreement as an instrument to which the mandatory, in the case of a mandated territory, would be a party.[5] It further regarded a trusteeship agreement as being of a contractual nature. But no further conclusions—for instance, as to whether a trusteeship agreement is, or should be, exclusively an interstate treaty—are to be extracted from its Opinion. The keynote of its attitude, which is to be deduced from its remarks concerning the mandates system, is that the constitution of a trust territory involves the giving to that territory of a status *in rem*.

[1] *I.C.J. Reports*, 1950, p. 141.

[2] Contrast Kelsen, op. cit., pp. 594 ff.

[3] *I.C.J. Reports*, 1950, pp. 128, 134.

[4] Ibid., pp. 141–2.

[5] See in particular the Separate Opinion of Judge Read, *I.C.J. Reports*, 1950, pp. 125, 168.

II. *The practice of the United Nations*

(*a*) *The General Assembly and the trusteeship agreements with respect to the mandated territories*

The Preparatory Commission was no more able than the San Francisco Conference to achieve a definition of 'the States directly concerned', whose participation in trusteeship agreements, or at least whose assent to the terms of trusteeship for any particular territory, is required by Article 79 of the Charter. But, at least at the first and second parts of the First Session of the General Assembly, it was universally assumed that a trusteeship agreement would take the shape of a formal instrument, probably a treaty, entered into by the 'States directly concerned' and thereafter jointly submitted to the appropriate organ of the United Nations for 'approval'.[1] No doubt this assumption was based in part on the theory that the trusteeship system was not, according to the letter of the Charter, to apply to any territory obligatorily.[2] It may have been reinforced, on the matter of the application of the system to mandated territories, by a recollection of the perennial dispute as to where, as between the mandatory Powers, the Principal Allied and Associated Powers, the League of Nations, and the inhabitants thereof, sovereignty over such territories resided.[3] As to territories to be detached from the then enemy states, it may have been thought that all the signatories to the projected treaties of peace would be 'directly concerned' in the disposition of those territories.[4] The fallacy might have been more obvious had more consideration been given to the third category of potential trust territories—territories to be voluntarily placed under the system by the states responsible for their administration. For, apart from the exceptional case of a territory under condominium or other international or quasi-international régime, it is difficult to see how there could be more than one state 'directly concerned' with respect to any territory coming within that category unless the administering authority were to be an entity other than the former sovereign. However, even here, it has to be realized that the Declaration regarding Non-Self-Governing Territories, which is part and parcel of the 'international charter of colonial administration' constituted by Chapters XI to XIII of the Charter, is of automatic application, and that attempts to secure the application of the trusteeship system to all dependent territories have not been lacking.[5]

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[1] See, for a useful summary of the debate, Wolfe in *American Journal of International Law*, 42 (1948), pp. 368–88.

[2] See *supra*, p. 164.

[3] See Sayre in *American Journal of International Law*, 42 (1948), pp. 263, 283; Wright, *Mandates under the League of Nations* (1930), pp. 111–12.

[4] See *infra*, p. 176, as to the actual history of the Italian colonies. Compare the original proposal to annex the mandates to the treaties of peace, *supra*, p. 168.

[5] Cf. the Indian proposal to the Second Session of the General Assembly inviting the placing of territories 'not ready for self-government' under the system, the fortunes of which are set out in Goodrich and Hambro, op. cit., p. 434.

The difficulty that the Trusteeship Council could not be set up until there were in fact administering authorities and thus trusteeship agreements[1] permitted of no return from the unfortunate interpretation of trusteeship 'agreement' as an inter-state treaty. Such Members of the United Nations as were mandatory Powers thus found themselves exposed to charges of obstructing the inauguration of one of the 'principal organs' of the organization. Accordingly, all of them, with the exception of the Union of South Africa, proceeded to make declarations of their readiness to bring the mandated territories for which they were responsible within the new system, and to go through other motions of good faith. Amongst these were the undertaking by the Governments of Belgium and the United Kingdom of tentative international consultations upon draft terms of trusteeship. That step was not intended to prejudge in any way the issue as to which were the 'States directly concerned'. However, instead of regarding it as a laudable attempt by the governments concerned to remove any doubts as to their good faith, the Fourth Committee hastily assumed that a practical means of implementing Article 76 in fact existed.[2]

The following table indicates the practical interpretation placed upon the phrase in relation to the eight trusteeship agreements approved at the second Session of the General Assembly:

1. Agreement for New Guinea;[3] Administering authority and former mandatory—Australia	Exchanged views with France, New Zealand, United Kingdom, United States.[4]
2. Agreement for Western Samoa;[5] Administering authority and former mandatory—New Zealand . . .	Exchanged views with Australia, the United Kingdom, and the United States.[6]
3. Agreement for Ruanda-Urandi;[7] Administering authority—Belgium . .	Submitted the agreement to the United Kingdom as a 'State directly concerned' and communicated it 'for information' to the other permanent members of the Security Council.[8]

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[1] See Art. 86 of the Charter.

[2] Cf. Wolfe, op. cit., p. 380.

[3] *United Nations Treaty Series*, vol. viii, p. 181.

[4] See U.N. Doc. A/117 (*Communications concerning Trusteeship Agreements*—memorandum prepared by the Secretariat), *United Nations, Official Records of the Second Part of the First Session of the General Assembly, Joint Committee, Part I, Summary Records*, Annex 12.

[5] *United Nations Treaty Series*, vol. viii, p. 71.

[6] See U.N. Doc. A/117. Phrases in the draft preamble to the agreement indicating that the terms thereof had been agreed upon by the states directly concerned and that the General Assembly, in approving the agreement, was satisfied that the provisions of Art. 79 of the Charter had been complied with, were examined in Sub-Committee 1 of the Fourth Committee. See the *Supplementary Report* thereof (Annex 22*a* to the volume of *Official Records* referred to *supra*, n. 4), para. 6. Compare as to the agreement for Tanganyika, p. 173, n. 4 *infra*.

[7] *United Nations Treaty Series*, vol. viii, p. 105.

[8] See *United Nations, Official Records of the First Part of the First Session of the General Assembly, Fourth Committee, Summary Records*, p. 25, and U.N. Doc. A/117. Cf. the view of the

4–5. Agreement for Togoland and Cameroons;[1] administering authority and former mandatory—France . .	Submitted the agreements to the United Kingdom 'as a State directly concerned' 'for approval' and 'for information' to the other permanent members of the Security Council.[2]
6–8. Agreements for Tanganyika, Togoland, and the Cameroons;[3] administering authority and former mandatory, the United Kingdom	Submitted the agreements for Togoland and the Cameroons to France, the agreement for Tanganyika to Belgium and all three to the Union of South Africa 'for comment', and all three to the other permanent members of the Security Council 'for information purposes'.[4]

In a formal sense, the General Assembly did not accept these individual interpretations. However, in consideration of them, Sub-Committee 1 of the Fourth Committee abstained from any attempt to find a general definition of the 'States directly concerned', and its parent body acquiesced in this inaction.[5] Instead, a proposal that the process of approval by the General Assembly should not be taken to 'prejudice the question of what States are or are not "directly concerned" within the meaning of Article 79' was adopted. The French delegation caused to be recorded a statement that its Government would consider approval of the agreements submitted by it necessarily to 'imply recognition of the fact that these agreements comply with the conditions of Article 79 of the Charter'.[6]

There was also inherent in the whole debate on the agreements so far

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United States delegate 'that if any State other than a mandatory Power were to be a State "directly concerned", the United States would have a strong claim to be considered as such a State, as a result of . . . its position as a permanent member of the Security Council and the Trusteeship Council . . .' (*Official Records* (referred to *supra*, p. 172, n. 4), pp. 77, 85).

[1] *United Nations Treaty Series*, vol. viii, pp. 165, 105.

[2] See U.N. Doc. A/117. Compare the procedure in respect of the agreement for Ruanda-Urandi, *supra*. See also the statement of the French delegate that 'France undertook to communicate with (*est entrée en rapport avec*) the United Kingdom concerning Togoland and the Cameroons as a result of the resolution of the Supreme Council of 7 May 1919 and of the decision of the Council of the League of Nations of 20 July 1922' (*Official Records* (referred to *supra*, p. 172, n. 4), p. 111).

[3] *United Nations Treaty Series*, vol. viii, pp. 91, 151, 119.

[4] See U.N. Doc. A/117 and see also the Prime Minister's statement to Parliament reproduced as Annex 3 to the volume of *Official Records* referred to *supra*, p. 172, n. 4. India presented a claim to be considered a state 'directly concerned' with regard to the agreement for Tanganyika in the shape of an amendment to the draft preamble. This was withdrawn upon the United Kingdom's deleting from the draft preamble a recital that the General Assembly had satisfied itself that Art. 79 had been complied with, but 'without prejudice to India's claim to be a 'State directly concerned' in regard to Tanganyika, and with no implication either of recognition or repudiation by the United Kingdom of any such claim by India' (*Supplementary Report* (referred to *supra*, p. 172, n. 6, para. 4).

[5] See the volume of *Official Records* (referred to *supra*, p. 172, n. 4), pp. 301, 173.

[6] See the *Supplementary Report* (referred to *supra*, p. 172, n. 6), paras. 2–3.

discussed a somewhat inarticulate assumption that 'the United Nations would not participate during the first stage of drawing up trusteeship agreements' and that: 'only when the agreements had been concluded would the General Assembly come into the picture'.[1] That assumption as much underlay the claims[2] or suggestions[3] of states which were not administering authorities, as it did the actions of the latter in engaging in international consultations. But the administering authorities displayed singular unanimity in confining themselves to mere consultation and in abstaining from submitting for approval drafts of actual treaties between themselves and even those states which they were prepared to regard as 'directly concerned'. One fresh justification for this emerged: Since the general intention of the trusteeship system is to make the territories placed thereunder a matter of concern to the whole United Nations and their good administration a matter of obligation towards the organization,[4] the entry into special obligations towards particular states by the administering authority of each territory concerned would have been invidious. For, as was stated, 'after the trusteeship agreements had been approved by the Assembly, any difference between the States directly concerned and the other States would cease to exist'.[5] There was much force in this submission, as there was in the view that 'since it was the United Nations which had set up the trusteeship system, it was the United Nations which must decide this question'.[6] Thus, though to the very end it was insisted in words that 'trusteeship agreements were not agreements submitted for the General Assembly's approval by the Fourth Committee. They were agreements submitted to the General Assembly by the States directly concerned',[7] the words used had lost all meaning—or rather the essential lack of clarity of Chapter XII of the Charter was accepted.

(*b*) *The Security Council: the Agreement for the former Japanese mandated islands*

Turning now from the experience of the General Assembly[8] to that of the Security Council, it may be noted that the agreement for the former

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[1] M. Loridor (Belgium), *United Nations, Official Records of the First Part of the First Session of the General Assembly, Fourth Committee, Summary Records*, p. 28.

[2] Cf. the Indian claim referred to *supra*, p. 173, n. 4. Cf. also the Brazilian claim to 'direct concern' in the Guianas, based on propinquity, and the 'Lebanese claim to similar interest with regard to any Arab territory which might be brought under the Trusteeship System' (*Official Records* (referred to *supra*, p. 172, n. 4), pp. 81, 168)).

[3] Cf. *supra*, n. 2.

[4] See p. 182, *infra*.

[5] M. Lisicky (Czechoslovakia): *Official Records* (referred to *supra*, p. 172, n. 4), p. 86.

[6] M. Lopez (Philippine Commonwealth), *United Nations, Official Records of the First Part of the First Session of the General Assembly, Fourth Committee, Summary Records*, p. 21.

[7] M. MacEachen (Uruguay) (Chairman): *Official Records* (referred to *supra*, p. 172, n. 4), p. 135.

[8] As to the agreement for Nauru see *infra*, p. 186, and as to the agreement for Somaliland under Italian administration *infra*, p. 176.

Japanese mandated islands[1] was transmitted in draft, for information only, by the United States (the occupant and the proposed administering authority) to the other members of the Security Council and to New Zealand and the Philippine Commonwealth. The composition of the Security Council having changed before the draft had been approved, it was subsequently communicated also to the new members. It differed from any trusteeship agreement previously drafted in providing for a process in the nature of ratification—namely, 'approval after due constitutional process'—on the part of the administering authority (Art. 16). However, a question was raised as to the requirement of Article 79 that the terms of trusteeship for a territory held under mandate shall be agreed upon by, *inter alios*, the mandatory Power. It was conceded that this requirement, in terms, related only to 'territories held under mandate by a Member of the United Nations', but it was argued nevertheless that, as Article 79 'does not in itself provide, either way, for the position of a territory held under mandate by a State which is not a Member of the United Nations . . . it does not necessarily follow that the consent of Japan as a mandatory power or the relinquishment of her mandate, in this case, is not required'.[2] Further, the U.S.S.R. proposed various amendments to the draft, and notably an amendment to Article 15 to the effect that the agreement might be 'altered, supplemented or terminated by decision of the Security Council'.[3] Upon this last Senator Austin observed that:

> 'The United States wishes to record its view that the draft trusteeship agreement is in the nature of a bilateral contract between the United States, on the one hand, and the Security Council on the other. The Agreement confines itself to provisions for the powers, duties and responsibilities of the administering authority . . . and does not attempt to define the responsibilities of the Security Council in this respect; they are in the Charter; and no amendment or termination can take place without the approval of the Security Council. . .'[4]

So that the amendment was, in the view of that country, unnecessary.

The discussion before the Security Council[5] reveals an extension of the process of departure from the thesis that a trusteeship agreement is an inter-state treaty and that the bringing of a territory under the trusteeship system involves two separate and distinct stages—that of agreement between states and that of subsequent approval by the appropriate organ of the United Nations. Indeed, it goes a long way towards establishing the character of trusteeship agreements as instruments to which the United

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[1] *United Nations Treaty Series*, vol. viii, p. 189.

[2] *United Nations, Official Records of the Security Council, Second Year*, p. 464 (Sir A. Cadogan, United Kingdom).

[3] Ibid., p. 469.

[4] Ibid., p. 476. Cf. the description of the agreement as one 'between the Security Council and the United States' by Secretary of State Marshall (*Hearings before the Committee on Foreign Relations*, 7 July 1947, p. 8).

[5] Ibid., pp. 516, 518, 521, 529, 672–3.

Nations is a contracting party. However, just as the United Nations is not, under a trusteeship agreement *in force*, an equal partner, as it were, with the administering authority concerned but rather in the position of a mandant towards a mandatory, or even a principal towards an agent, so the United Nations does not appear to stand on an equal footing with the prospective administering authority in so far as concerns the *negotiation* of such an agreement. The formulation of the terms of a trusteeship agreement is, it might appear from this precedent, exclusively the province of the prospective administrative authority—except to the extent that the latter may or may not be obliged to undertake some sort of consultation with other states obviously, or in its judgment, 'directly concerned'. The precedent also reveals a tendency to disregard the necessity for strict conveyance of territorial title in the bringing of a territory within the trusteeship system.

(*c*) *The case of Italian Somaliland*

The action taken by the General Assembly with respect to the former Italian colonies displays the same tendency in the development of the conception of a trusteeship agreement. Article 23 of the Treaty of Peace with Italy provided for the renunciation by Italy of all right and title to its territorial possessions in Africa, i.e. Libya, Eritrea, and Somaliland. It was not expressed in whose favour this renunciation was made, but it was provided that 'pending their final disposal' the territories concerned should continue under their 'present administration', which was in fact British military administration. It was further laid down that their 'final disposal' should be determined jointly by the Governments of the U.S.S.R., the United Kingdom, the United States, and France 'in the light of the wishes and welfare of the inhabitants and the interests of peace and security, taking into consideration the views of other interested governments; and that failing agreement upon the disposal of any of the territories concerned within one year of the entry into force of the Treaty, the matter should be referred to the General Assembly of the United Nations for a recommendation, and the four Powers agree[d] to accept the recommendation and to take effective measures to give effect to it'.[1] The Council of Foreign Ministers of the four Powers was unable to agree and the question ultimately came before the General Assembly. The outcome of these deliberations was the adoption on 21 November 1949 of Resolution 289 (IV) whereby there was recommended: (*a*) that Libya should be constituted an independent state not later than 1 January 1952, a United Nations Commissioner and a Council aiding a National Convention of the inhabitants to this end; (*b*) that Italian Somaliland should ultimately become likewise an independent state but that meanwhile it should be 'placed under the International Trusteeship System with Italy as the Administering Authority'; and (*c*) that a Commission should be established to ascertain more fully 'the wishes and the best means of promoting the welfare of the inhabitants of Eritrea'.[1]

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[1] *Treaty Series*, No. 30 (1950).

These transactions raised important legal issues relevant to the trusteeship system. For it is evident that the General Assembly rejected any view that the trusteeship system was necessarily applicable to the territories concerned in virtue of their status as 'territories . . . detached from enemy states as a result of the Second World War' within the meaning of Article 77 (1) (*b*) of the Charter. Such a view was indeed expressed from time to time in the course of the extraordinarily protracted debates on the subject. And the First Committee at first proposed that other territories than Somaliland, namely Cyrenaica, Fezzan, and Tripolitania (which together constitute Libya) should be placed under trusteeship.[2] With respect to Eritrea, however, the same committee proposed that the whole of that territory, except for the Western Province, should be placed under the sovereignty of Ethiopia subject to certain safeguards respecting the protection of minorities and the granting of appropriate municipal charters to the cities of Asmara and Massawa.[3] Nor was this the only proposal for the disposition of part of the territories concerned otherwise than by their direct investment with the status of trust territories, since it was also suggested, though the First Committee apparently did not follow up the suggestion, that the Western Province of Eritrea should be incorporated into the Sudan.[4] These proposals for annexation do not require to be considered here, but it may be remarked that they differ essentially from the definitive recommendation made by the General Assembly with respect to Libya. For the latter is entirely consonant with the 'basic objectives' of the trusteeship system as laid down in Article 76 of the Charter, one of these being the promotion of the progressive development towards independence of the inhabitants of trust territories. Thus, even if Article 23 of the Peace Treaty with Italy is interpreted to require the application of the trusteeship system to the territories to which it relates, it can scarcely be contended that it has been violated when the view is taken that one of these territories is already ripe for the final phase in the evolution of a trust territory, namely, independence. But in this connexion the assumption of authority by the General Assembly to appoint a Commissioner and an Advisory Council to assist in the bringing about of this final phase in Libya is of interest. It might be thought, upon a strict construction, that the appropriate procedure would have been for the General Assembly to recommend the appointment of such Commissioner and Council to the four Powers, and for these last, in pursuance of their agreement, 'to take effective measures to give effect to' any relevant recommendation, to conclude, or cause to be concluded, a trusteeship agreement to this end. Nevertheless, the setting up of the Advisory Council for Libya is not an isolated act. It must be appreciated in the light of the General Assembly's not dissimilar action with respect to Somaliland and Eritrea.

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[1] *United Nations, Official Records of the Fourth Session of the General Assembly, Resolutions,* p. 10.

[2] Report of the First Committee (A/873, para. 41), *United Nations, Official Records of the Third Session of the General Assembly, Part II, Annexes to the Summary Records of Meetings,* pp. 91, 98–99.

[3] Ibid.

[4] Ibid., para. 11.

With respect to Somaliland the General Assembly's recommendation of the giving of the status of a trust territory to that area is particularly significant in that the termination, in favour of independence, of that status after the specifically limited period of ten years is specially stipulated. So also is its recommendation that the administering authority should be Italy —a non-Member of the United Nations—aided and advised by an Advisory Council composed of representatives of three other states.[1]

The recommendation of the General Assembly contained two other clauses relating to the administering authority and to the content of the trusteeship agreement envisaged. For it contemplated the temporary administration of the territory by Italy in pursuance of an undertaking to act 'in accordance with the provisions of the Charter relating to the International Trusteeship System and to the Trusteeship Agreement pending approval by the General Assembly of a Trusteeship Agreement for the territory'.[2] This provision was made in view of the anxiety of the United Kingdom to be relieved of its responsibilities, but it raised a nice problem as to whether such temporary administration could institute a 'final disposal' of the territory so as to permit the cessation of the 'present administration' in accordance with the Treaty of Peace. Upon a strict 'treaty' view of the nature of a trusteeship agreement and the manner of its conclusion there theoretically could, under this arrangement, arise a situation in which Italy, having regained control of the territory, refuse to conclude a trusteeship agreement.[3] Finally, the recommendation provided that 'the Trusteeship Council shall negotiate with the Administering Authority the draft of a Trusteeship Agreement for submission to the General Assembly. . .'[4] This implied a conception of a trusteeship agreement altogether different from any hitherto achieved or suggested—of an agreement between the administering authority made with one organ of the United Nations and approved by another.

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[1] And an ex-enemy state. As to the consonance of the proposal with the text of the Charter and the *travaux préparatoires* see this *Year Book*, 26 (1949), pp. 108, 122–8.

[2] Resolution 289 (iv), para. 88, loc. cit. p. 12.

[3] See *United Nations, Official Records of the Fourth Session of the General Assembly, First Committee, Summary Records*, pp. 660–2.

[4] Ibid., para. B. 5.

In pursuance of the recommendation Italy entered upon the temporary administration of the territory and the Trusteeship Council proceeded to the drafting of the trusteeship agreement. It invited to participate in its deliberations not only Italy but the two states designated as members of the Advisory Council not already members of the (Trusteeship) Council; and also India 'to take part in the work . . . in so far as concerned the general principles of the constitution of the Territory'. The Government of Ethiopia having requested to be permitted to take part in the discussions as a 'State directly concerned' in the sense of Article 79 of the Charter, that state was also admitted, though without 'any decision as to whether Ethiopia was in fact a "State directly concerned" ' and without its being accorded any right to vote.[1] A drafting Committee was then set up and instructed 'taking into account such draft as Italy might care to propose, to seek agreement on the text of a draft Trusteeship Agreement'.[2] The draft achieved, to which was annexed a 'Declaration of Constitutional Principles', was unanimously adopted by the Trusteeship Council, and has since been approved by the General Assembly.[3] These proceedings are of remarkable significance. They indicate a very great departure from the conception of the trusteeship agreement as an inter-state treaty. They show an increasing emphasis upon the quasi-statutory character of trusteeship agreements and the 'objective character' of the trusteeship system.

III. *The texts of the agreements*

(*a*) *Form and formal clauses*

The trusteeship agreements for Tanganyika, the Cameroons and Togoland under British Administration, the Cameroons and Togoland under French Administration, Ruanda-Urandi, and New Guinea each mention only one state by name—the single administering authority. It is also a common characteristic of this group of agreements that they are neither signed nor ratified, nor subjected to any similar process by any state. Whilst some of them speak of the administering authority being 'hereby designated', others merely refer to the state concerned as acting in the capacity of administering authority. The preambles, wherein the requisite 'approval' of the organ of the United Nations concerned is declared, are likewise diverse, though all of them recite such approval all recite also the 'desire' or 'willingness' or 'undertaking'—significantly never the 'agreement'—of the mandatory to place the territory under the trusteeship system. Two only indicate a date of entry into force—the agreements for (French) Togoland and (French) Cameroons by reference to the approval of the General Assembly. None contains any indication as to how it may be terminated; a majority only stipulate that they shall not be altered or amended save in accordance with the relevant provisions of the Charter.[1]

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[1] *United Nations, Draft Trusteeship for the Territory of Somaliland under Italian Administration, Special Report of the Trusteeship Council*, para. 2, *General Assembly, Official Records, Fifth Session, Supplement No. 10*, p. 3.

[2] Ibid., para. 3.

[3] See *United Nations Bulletin*, vol. ix (1950), p. 694.

As already mentioned a statement of the approval of the competent organ of the United Nations is contained in the preamble to each agreement in the category under review. The General Assembly has also declared, by Resolution 63 (I) that it approves them 'separately (*séparément*)'.[2] The meaning of this word in this context is not wholly clear, and it is thus not apparent whether the definitive approval is to be found in the resolution referred to and is merely recited in the preamble to each agreement, or whether the statement in each agreement is the operative one and the resolution supererogatory. If the General Assembly can only act by resolution,[3] it must be the resolution which is in each case the operative instrument.[4] On this basis the 'differentiation between the stage of negotiation' (between states) and the 'stage of approval' (by the United Nations) would seem correct with respect to this category of agreements and it would not seem possible to argue that the United Nations, or any organ thereof, is a contracting party to any of them. But, as the wording of Resolution 63 (I) perhaps shows, there is room for another view: that the process of approval is an integral part of the process of contracting such an agreement. If, therefore, the latter does not constitute an inter-state treaty, it may nevertheless constitute a treaty between the United Nations and an administering authority. The United Nations Secretariat seems to have taken this view in proceeding to the registration *ex officio* of the various agreements in pursuance of the regulations made under Article 102 of the Charter. Since none of the agreements authorized its *ex officio* registration, the basis of the latter must have been an opinion that they were instruments to which the United Nations is a party.[5]

The agreement for Nauru is one the nature of which is often misunderstood. Its provision designating the three Governments of Australia, New Zealand, and the United Kingdom 'as the joint authority which will exercise the administration'[6] has thus been interpreted as making it 'unique' and as indicating that it 'was submitted as an agreement between these three Governments'.[1] It has likewise been claimed that, because it is an agreement between these three Governments, the agreement in question is the only trusteeship agreement in existence which conforms to the Charter by constituting an agreement 'between the states directly concerned'.[2] It is submitted, however, that these interpretations are open to question and that the agreement is not a treaty or quasi-treaty between the three Governments concerned. For the preamble recites the conferment of the mandate for Nauru 'upon His Britannic Majesty' and *His Majesty's* desire to place the territory under the trusteeship system. The three Governments are indeed 'designated as the joint [administering] authority' but 'in pursuance of an agreement made by the Governments of Australia, New Zealand and the United Kingdom [*scil.* distinct from the trusteeship agreement]' the first named will act on behalf of all of them and '*except and until otherwise agreed*' between them, will *continue* to exercise full governmental powers in the territory.[3] It is thus difficult to regard the instrument, which merely perpetuates the pre-existing arrangement, as a treaty between 'states directly concerned' since Article 79 of the Charter requires, in addition to agreement between such states, approval by the United Nations of 'any alteration or amendment' of trusteeship terms. There has moreover to be taken into account the doctrine of the Commonwealth—which is not necessarily of significance in general international law—that inter-Commonwealth relations are of a constitutional rather than an international nature.

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[1] I.e. Art. 79; some of these agreements, perhaps curiously, provide that nothing therein is to affect the right of the administering authority to *propose* their amendment for the purpose of the designation of all or part of the territory concerned as a strategic area 'or for any other purpose not inconsistent with the basic objectives of the Trusteeship system'. Cf. the agreement for Somaliland under Italian Administration, *infra*, p. 181.

[2] *United Nations, Official Records of the Second Part of the First Session of the General Assembly, Resolutions*, p. 122.

[3] See this *Year Book*, 26 (1949), pp. 108, 114.

[4] Compare the case of the agreement for Nauru, which is referred to in the resolution of approval (Resolution 140 (II)) as 'the proposed agreement': *United Nations Official Record of the Second Session of the General Assembly, Resolutions*, p. 47.

[5] See Schachter in this *Year Book*, 25 (1948), pp. 91, 129–30.

[6] Art. 2, loc. cit.

The agreement for the 'Territory of Somaliland under Italian Administration',[4] in its preamble, recites not only the approval of the General Assembly but also the fact of its negotiation and approval by the Trusteeship Council. The states members of the Advisory Council are not expressed to be parties to it though provision is made for the constitution and seat of that body.[5] It is provided that the agreement shall not be altered or amended except in accordance with Articles 79 and 85 of the Charter, but that nothing therein shall affect the right of the Administering Authority or the Trusteeship Council to propose its alteration or amendment in the interests of the territory or for reasons not inconsistent with the basic objectives of the trusteeship system.[6] It is not to enter into force until approved by the General Assembly and ratified by Italy, though provision for the temporary administration of the territory by Italy pending its entry into force is made.[7] It is to cease to have effect ten years after the date of its approval by the General Assembly, the territory then becoming an independent state and its duly constituted independent government assuming all functions of the administering authority in accordance with a plan for 'orderly transfer' of such functions submitted by the latter to the Trusteeship Council not less than eighteen months before the expiry of the agreement.[1]

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[1] Goodrich and Hambro, op. cit., p. 440.

[2] Kelsen, op. cit., p. 602.

[3] Art. 4.

[4] Loc. cit.

[5] Art. 2.

[6] Art. 21. Cf. *supra*, p. 180, n. 1.

[7] Art. 23.

(*b*) *Particular clauses of a 'treaty' character*

Amongst provisions to be found in the trusteeship agreements which are familiar in treaty practice proper two may be mentioned in especial. The first is the most-favoured-nation clause. In the second place most of the agreements contain jurisdictional clauses, e.g. Article 19 of each of the agreements for Tanganyika, Togoland, and Cameroons under British administration last quoted, which is in these words:[2]

> 'If any dispute whatever should arise between the Administering Authority and another Member[3] of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the United Nations Charter.'[4]

A striking feature of the clauses quoted is that they purport to apply, not as between the administering authority and the United Nations as such, but between the former and the individual Members of the latter.

(*c*) *The objective character of the agreements*

In addition to clauses, such as quasi-'most-favoured-nation' clauses and the common-form jurisdictional clause already discussed, which operate as between the administering authority and other states individually, the trusteeship agreements so far elaborated contain stipulations operating between the administering authorities and the United Nations as such. The standard undertaking to make 'to the General Assembly of the United Nations an annual report on the basis of a questionnaire drawn up by the Trusteeship Council in accordance with Article 88 of the United Nations Charter'[5] is of this character. But when it is sought to multiply examples of obligations specifically undertaken towards the United Nations, it is not easy to find them. The undertaking to apply, in the trust territory concerned, 'the provisions of any international conventions and recommendations already existing or hereafter drawn up by the United Nations or by the specialized agencies . . . which may be appropriate or which would conduce to the achievement of the basic objectives of the International Trusteeship System'[1] is of ambiguous quality. For presumably it refers to such conventions as those governing the drug traffic, which are inter-state agreements. The clause thus appears to amount to an agreement to agree —with other states. And, for different reasons, it is equally difficult to construe the primary undertaking to administer the territory 'in such a manner as to achieve the basic objectives of the International Trusteeship System laid down in Article 76 of the United Nations Charter . . . to collaborate fully with the General Assembly . . . and the Trusteeship Council in the discharge of all their functions as defined in Article 87. . . .'[2] For, given that the territory is brought under trusteeship, this obligation follows directly from the Charter.

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[1] Arts. 24, 25.

[2] Loc. cit.

[3] In the agreement for Somaliland under Italian administration 'a State Member' (Art. 22, loc. cit.).

[4] The agreements for New Guinea and Nauru contain no comparable provision—'presumably for the reason that Australia had already accepted the compulsory jurisdiction of the Court' (Goodrich and Hambro, op. cit., p. 451, n. 118). There is not, either, any comparable provision in the agreement for the former Japanese-mandated islands. If the explanation of the omission in the cases of New Guinea and Nauru which has been quoted be correct, it may be asked what is the effect of the reservation, to the United States' acceptance of the Optional Clause, of 'disputes arising under a multilateral treaty unless . . . all Parties to the treaty affected by the decision are also Parties to the case before the Court . . .' (see the *Yearbook of the International Court of Justice*, 1947–8, p. 142).

[5] E.g. the agreement for (British) Togoland, loc. cit., Art. 16.

Many of the provisions of the trusteeship agreements purport to confer rights on the administering authority rather than obligations. Of this nature are the provisions investing the administering authority with the legislative, administrative, and judicial power, with the authority to bring the trust territory into a customs, fiscal, or administrative union with territory under its own sovereignty, and with the power to provide for the defence of the territory.[3] Such 'rights' of the administering authority are not, however, the correlatives of obligations of the United Nations, nor do they fall into the same category as rights which other states derive from the trusteeship agreements. They are to be taken together with the class of obligations of the administering authority—into which class the general obligation to administer the territory for the achievement of the basic objectives of the trusteeship system perhaps also comes—of which the beneficiary is not the United Nations or any other state but the population of the trust territory. Examples of obligations of this class are those of the administering authority to promote the development of free political institutions[4] and to frame land laws with due regard to local custom.[5] These rights and obligations together constitute the objective régime of the trust territory, and it is the creation of an objective status which is the principal legal effect of a trusteeship agreement.

Their real nature, the quasi-constitutional or statutory character of the trusteeship agreements, is apparent in every one of them, though, in the case of those first drafted, it was to some extent obscured by a use of the language of mutual promises. In the agreement for Somaliland under Italian Administration it is, however, underlined by the annexure to that agreement, as 'an integral part'[1] thereof, of a 'Declaration of Constitutional Principles'. Even in the body of that agreement its function as a partial written constitution is clear. For it is, for instance, provided that the administering authority shall be represented by an administrator, who shall have his seat in a particular place.[2] The annexed Declaration stipulates that the administrator 'shall appoint a Territorial Council, composed of inhabitants of the Territory and representatives of its people'.[3]

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[1] Cf. ibid., Art. 7.

[2] Cf. ibid., Art. 3.

[3] Cf. ibid., Art. 5.

[4] Cf. ibid., Art. 6.

[5] Cf. ibid., Art. 8.

IV. *Conclusion*

The foregoing argument may be summarized in the following propositions:

1. The draftsmen of the Charter envisaged trusteeship agreements as inter-state agreements to which the United Nations would not—save possibly in the case where that organization itself became an administering authority—be a contracting party. There is some evidence that it was also the intention of the draftsmen that the negotiation and conclusion of trusteeship agreements with respect to mandated and ex-enemy territories should be the legal duty of Members of the United Nations concerned. It was probably assumed that the administering authority designated therein would always be a party to a trusteeship agreement. Whilst little consideration was given to conveyancing details, it would appear that the treaty-character envisaged for the agreements, taken together with the circumstance of its obligatory application to mandated and ex-enemy territories, involved that there would, with respect to these categories of territories at least, be other parties also.

2. The intentions of the draftsmen were not, however, translated into law. The text of the Charter is, in relation to the trusteeship system, highly ambiguous. Authoritative interpretation has made it clear that the application of the trusteeship system is in no case obligatory, but that capacity to place a territory under that system is to be decided exclusively by the law of the Charter, without necessary regard to the rules of general international law respecting transfer of territorial title. This last circumstance is primarily a consequence of the fact that the status of a trust territory, as that of a mandated territory, is a status *in rem*, a new international legal conception to which the classical rules relating to territorial sovereignty do not apply.

3. The implementation of the intentions of the draftsmen of the Charter and of the sense of the text that trusteeship agreements should be inter-

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[1] Loc. cit., Art. 23.

[2] Art. 2.

[3] Art. 4.

state treaties to which the appropriate organ of the United Nations should be a confirming, rather than a contracting, party has proved impossible in practice. Experience has demonstrated that the conception of such agreements is gradually altering and they have come—first unconsciously and then consciously—to be drawn up in effect as agreements of a contractual sort between the United Nations and the several administering authorities exclusively.

4. As actually achieved in the form of treaties between the United Nations and the several administering authorities, the trusteeship agreements are legal acts distinct from the Charter. They possess, however, a dispositive (or conveyancing) as well as a contractual character. In their 'dispositive' aspect they are not independent of the Charter. Together with the relevant provisions of the Charter they constitute a quasi-statutory basis for the trusteeship system as in fact applied to specific territories. They have, as has the régime which they inaugurate and govern, an objective character. This is perhaps their most important aspect.

FOREIGN ARMED FORCES: IMMUNITY FROM CRIMINAL JURISDICTION[1]

By G. P. BARTON, B.A., LL.M.

I. *Introductory*

In an article in the preceding issue of this *Year Book*[2] consideration was given to the immunity of visiting forces from the exercise of supervisory jurisdiction of the local courts. The present article is concerned with the exercise of criminal jurisdiction by the courts of a state over members of a visiting force which it has received into its territory. Criminal jurisdiction is exercised whenever the courts of a state take cognizance of an offence against the penal law of that state. This definition excludes the pre-trial activities of the police and other law enforcement agencies of a state in detecting, apprehending, and prosecuting offenders against the penal law. The policeman is an official of the executive, not of the judiciary. Thus, a member of a visiting force is subject to the exercise of criminal jurisdiction by the local state only when he is liable to be tried in its courts for offences against its penal law.

The term 'visiting' when used to describe an armed force implies that this force has come to and sojourns in the territory of the local state with its consent and at its invitation. It is not unknown for such consent to be given reluctantly. But we are here concerned only with the position of a foreign force which visits the local state with its full and free consent and pursuant to its unsolicited invitation.[3] It will therefore sometimes be necessary, when assessing the evidentiary value to be accorded to the practice of states and decisions of courts on this question, to scrutinize carefully the circumstances which occasioned the presence of the foreign force on local soil. Finally, the meaning of the word 'forces' will include the military, naval, and air forces of a foreign state on the land territory of the local state. Accordingly, the position of forces on the warships or in the aeroplanes of a foreign state which may be in the territorial waters or, in the case of the latter, in the territorial airspace of the local state is outside the purview of this article. It does include, on the other hand, a consideration of the exercise of criminal jurisdiction over air force personnel on ground and naval personnel ashore.

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[1] The following abbreviations, apart from those in common use, appear throughout this article: *A.B.A.J.—American Bar Association Journal; A.J.—American Journal of International Law; A.L.J.—Australian Law Journal; A.L.R.—The Argus* newspaper Law Reports, Melbourne, Australia; *Annual Digest—Annual Digest of Public International Law Cases*, 1919–32; *Annual Digest and Reports of Public International Law Cases*, 1933–date; *Bulletin—Bulletin de Législation et de Jurisprudence Egyptiennes; Can. B.R.—Canadian Bar Review; Clunet—Journal du Droit International fondé par E. Clunet; Dalloz—Jurisprudence Générale, Recueil Périodique et Critique fondé par MM. Dalloz; D.L.R.—Dominion Law Reports* (Canada); *E.A.S.—Department of State Executive Agreement Series* (United States of America); *F.R.—Foreign Relations of the United States of America* (Edited by the Department of State); *G.T.M.—Gazette des Tribunaux Mixtes* (Egypt); *J.O.—Journal Officiel de la République Française; J.T.M.—Journal des Tribunaux Mixtes* (Egypt); *L.Q.R.—Law Quarterly Review; Mod.L.R.—Modern Law Review; P.C.—Privy Council* (Canada); *Revista—Revista Militar Brasiliera*; *Sirey—Jurisprudence Générale, Recueil Périodique et Critique fondé par M. Sirey; Sol. Jo.—Solicitors' Journal; S.R.—Statutory Regulation* (Australia or New Zealand); *S.R.N.S.W.—State Reports, New South Wales* (Australia); *S.R. & O.—Statutory Rules and Orders* (United Kingdom); *U.K.T.S.—United Kingdom Treaty Series; U.N.T.S.—United Nations Treaty Series.*

[2] Barton, 'Foreign Armed Forces: Immunity from Supervisory Jurisdiction', this *Year Book*, 26 (1949), p. 380. That article, as well as the present one, was prepared by the writer while engaged in research in the University of Cambridge under a Humanitarian Trust Studentship awarded by the University. The writer desires to express his grateful acknowledgement to the Trustees of the Humanitarian Trust Fund.

[3] Cf. Exchange of Notes between the Governments of China and the United States of

It is proposed to discuss the subject of this article under the following main heads: (1) international agreements; (2) municipal legislation; and (3) case law.

II. *International agreements*

(*a*) *The First World War*

The first series of relevant international agreements consisted of those which were concluded between the Allied Governments during the First World War. It has already been submitted elsewhere[1] that the expressed purpose, and the main effect, of these agreements was to qualify the unrestricted jurisdiction which an army of occupation by consent was deemed to have over all persons, military or civilian, in the occupied area. Thus the early Franco-Belgian Agreement of 14 August 1914[2] exempted Belgian nationals from the exercise of the otherwise unlimited jurisdiction of the French military courts in Belgium. The second Franco-Belgian Agreement,[3] which was concluded on 29 January 1916, withdrew completely from the exercise of the jurisdiction of the French military courts in Belgium all persons, whether civilians or not, who did not belong to the French army. This last exemption was common to all the jurisdictional agreements concluded between the Allies during the First World War. These derogations from the exercise of the jurisdiction of the service courts of the visiting Allied forces did not impair the exercise of their residual jurisdiction over members of their own forces. Without exception the inter-Allied agreements gave recognition to 'la compétence exclusive des tribunaux . . . (des) armées d'opérations respectives à l'égard des

America constituting an Agreement relating to the presence of the armed forces of the United States of America on Chinese territory, 29 August and 3 September 1947. *U.N.T.S.*, vol. ix, No. 126, at p. 94, Note from the Political Vice-Minister of China: '. . . I have the honour, on behalf of my Government, to state that all armed forces of the United States now stationed in China are so stationed with the consent of the Chinese Government.'

[1] Barton, loc. cit., at pp. 387–90.

[2] *J.O.*, 4 December 1914; *Dalloz* (1915), Part iv, p. 25.

[3] *J.O.*, 29 January 1916, p. 809; *Clunet*, 43 (1916), p. 726.

personnes appartenant à ces armées, quels que soient le territoire où elles se trouvent et la nationalité des inculpés'.[1] The words 'compétence exclusive' are appropriate to cover the exercise of jurisdiction over members of a visiting army for offences which they may have committed against the local penal law. The apparent effect of these agreements therefore was to exempt members of an Allied army from prosecution in the courts of another ally for offences against the local law.

This was the view of the French courts in the few cases where the application of the agreements fell for consideration. In *Ministère Public* c. *Bomans*[2] the accused was a deserter from the Belgian army who was charged with obtaining money by false pretences from his fellow countrymen in France. It was contended on his behalf that by virtue of the provisions of the Franco-Belgian Agreement of 29 January 1916,[3] which recognized the exclusive jurisdiction of the Belgian courts martial over members of the Belgian army of operations in France, he was immune from the exercise of jurisdiction by the French courts. The Tribunal Correctionnel de la Seine (10^e^ Chambre), before which the charge was brought,

> 'attendu que les autorités belges interprètent cet accord dans ce sens que le militaire belge, déserteur, n'est justiciable que de la justice de l'armée à laquelle il appartient',[2]

declared that it was unable to exercise jurisdiction over the accused. A similar attitude was expressed by the two lower courts which heard the case of *Ministère Public* c. *Pratt* before it was finally disposed of by the Court of Cassation. At the time of the offence with which he was charged the accused was an officer in the army of the United States of America. The French civil court before which he was prosecuted accepted his contention that, as the Franco-American Agreement of 14 January 1918[4] was then still in force, the French courts were unable to exercise jurisdiction over him, notwithstanding that he had been demobilized before the charge was brought. The Court of Cassation,[5] however, disagreed with the application to the circumstances of the case of the principle of immunity recognized as flowing from the Franco-American Agreement. It availed itself of the interpretation given to the agreement by both of the interested Governments.

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[1] Cf. the Franco-Belgian Agreement of 29 January 1916, *Clunet*, 43 (1916), p. 726, at p. 727.

[2] *Revue de droit international privé*, 13 (1917), p. 245. For comment see Chalufour, *Le Statut Juridique des Troupes Alliées pendant la Guerre 1914–1918* (1927), p. 63.

[3] *J.O.*, 29 January 1916, p. 809; *Clunet*, 43 (1916), p. 727.

[4] *J.O.*, 16 February 1918, p. 1161; *Clunet*, 45 (1918), pp. 867–71; *F.R.*, 1918, Supplement 2, p. 737.

[5] *Dalloz* (1921), Part i, p. 58; *Clunet*, 48 (1921), p. 970; *Annual Digest*, 1919–22, Case No. 240, p. 332. For a decision of a French court martial at Bourges recognizing the exclusive jurisdiction of the service courts of the armed forces of the United States of America over the accused, even though at the time of the offence he was a member of the French army and not a member of the United States army, see *Affaire Ray*, *Clunet*, 45 (1918), p. 654, where the local court exercised jurisdiction on a waiver of their exclusive jurisdiction by the authorities of the Allied force.

It said: 'dans ces conditions, qu'en se fondant sur ledit accord, reconnu inapplicable à l'espèce par les Gouvernements intéressés, la Cour n'a pas justifié sa décision d'incompétence.'[1]

Although the Government of the United Kingdom had entered into jurisdictional agreements with Belgium[2] and France[3] whereby it agreed to recognize the exclusive jurisdiction of the service courts of the Belgian and French armies over members of those respective armies on whatever territory they might be, it seems to have been the view of the English courts and, it would appear, of the British Government, that these agreements did not have the effect of exempting a member of the Belgian or French armies from the exercise of criminal jurisdiction by the courts of the United Kingdom. The only case upon which this induction can be founded concerned a Belgian soldier who was alleged to have shot and severely wounded another Belgian soldier while they were both in London. Immediately after the incident the accused, Aughet, was arrested by the British police and handed over to the Belgian military authorities who took his depositions preparatory to bringing a charge against him before a Belgian court martial at Calais. Before Aughet was removed to France, de Dryver, the victim of the assault, commenced a private prosecution against him for attempted murder. This charge was heard in the Bow Street Police Court on 21 September 1917.[4] Counsel for Aughet informed the court that the Belgian military authorities had proposed to bring the accused before a Belgian court martial and asked that the case be adjourned for six weeks. In spite of objections from counsel for de Dryver the Magistrate made the order asked for. De Dryver, however, who was persuaded that the charge against Aughet would have little chance of success if brought before a Belgian military court, Aughet being his superior, applied for and obtained from the Vacation Judge a rule *nisi* in the nature of a *mandamus* calling on the Magistrate to show cause why he should not dispose of the charge forthwith.[5] The Divisional Court discharged the rule, solely because it was of the opinion that the Magistrate had power to adjourn the case for six weeks.[6] In his judgment Darling J. said:

> 'If he (the Magistrate) had declined or refused to hear the case the Court might issue the *mandamus*, but I have come to the conclusion that the Magistrate did not decline jurisdiction or refuse to hear and determine: he simply adjourned the case for six weeks.'[7]

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[1] *Ministère Public* c. *Pratt*, see above, p. 188, n. 5.

[2] *London Gazette*, 14 April 1916, p. 3917.

[3] Ibid., 31 December 1915, p. 13025; *J.O.*, 16 December 1915, p. 9199; *Clunet*, 43 (1916), p. 356.

[4] *R.* v. *Aughet*, *The Times* newspaper, 22 September 1917, p. 3*c*.

[5] *R.* v. *Garrett, ex parte de Dryver*, *The Times* newspaper, 27 September 1917, p. 3*d*.

[6] *R.* v. *Garrett, ex parte de Dryver* (1917), 34 T.L.R. 13.

[7] Ibid., at p. 14.

The trial of Aughet before the Belgian court martial at Calais resulted in an acquittal. On his return to England the criminal proceedings against him were resumed, the prosecution now being handled by the Crown. In argument before the court it was not once suggested that the Anglo-Belgian Agreement of 15 April 1916 precluded the English courts from entertaining the prosecution. It cannot be supposed that the court of first instance or the Court of Criminal Appeal,[1] to which the case finally came, was unaware of the existence of this agreement, because reference was made to it in sustaining the defence of *autrefois acquit* which Aughet raised. In order that this plea should be successful it had to be shown that according to English law the Belgian court martial was a competent court to have tried Aughet. The Anglo-Belgian Agreement of 15 April 1916 was relied upon by the Court of Criminal Appeal in holding that this requirement had been satisfied.[2] It is clear that none of the courts concerned with this case was of the opinion that the Anglo-Belgian Agreement rendered Aughet immune from criminal proceedings in an English court.

The agreements which the Government of the United Kingdom had entered into with the Governments of Belgium and France contained an unequivocal statement by which it recognized the exclusive jurisdiction of the service courts of the Belgian and French armies over members of their respective armies on whatever territory they might be. It is, therefore, of some importance to appreciate the reason why this positive recognition was not regarded as conferring immunity from criminal proceedings on members of the Belgian and French armies in the United Kingdom who might have committed offences against English law. Two reasons may be propounded. The first relates to the interpretation of the agreements, and in particular of the words 'army of operations'[3] which appear therein. When the Vacation Judge granted the rule *nisi* in the nature of a *mandamus* calling upon the Bow Street Magistrate to hear and determine the charge which de Dryver had brought against Aughet, he ruled as an integral part of the order that no steps should be taken to remove either Aughet or de Dryver out of England and that his ruling should be communicated to the military authorities concerned.[4] The Belgian military authorities, who alone were affected by the order, complained that the Anglo-Belgian Agreement of 15 April 1916, by giving the military tribunals of the Belgian army of operations exclusive jurisdiction over members of that army,[5] precluded the

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[1] *Aughet* v. *The King* (1918), 34 T.L.R. 302.

[2] Ibid., at p. 304.

[3] Cf. the Anglo-French Agreement of 15 December 1915, *Clunet*, 43 (1916), p. 356: '. . . la compétence exclusive des tribunaux de leurs *armées d'opérations* respectives à l'égard des personnes appartenant à ces armées.'

[4] *R.* v. *Garrett, ex parte de Dryver, The Times* newspaper, 27 September 1917, p. 3*d*.

[5] The Belgian authorities relied especially on the words 'à l'égard des personnes appartenant à ces armées *quel que soit le territoire où elles se trouvent . . .*'.

Vacation Judge from making an order as to the disposition of Aughet or de Dryver. The British Government replied, however, that in its view the Anglo-Belgian Agreement had 'no application to the case . . . because neither of the Belgian soldiers concerned on the (date of the crime) formed part of any "Army of Operations"[1] to the members of which the Declaration alone is applicable'. Thus interpreted the Agreement would not apply to any persons subject to Belgian military law who were not within the zone of operations. Since the United Kingdom was not within the zone of operations as defined by the British Government,[2] any member of the Belgian and similarly of the French armies who happened to be in England could not be a member of an 'army of operations', and would not therefore be within the scope of the agreements.

A second and more substantial reason for the attitude which, seemingly, regarded the jurisdictional agreements as having no effect in the United Kingdom relates to the well-known principles which in Great Britain curb the treaty-making powers of the Crown. It is a firmly established rule of English law that 'such treaties as affect private rights and, generally, as require for their enforcement a modification of common law or of a statute must receive parliamentary assent through an enabling Act of Parliament'.[3] The recognition that a body of persons in the United Kingdom were subject to the exclusive jurisdiction of tribunals which did not owe their existence to the British Parliament comprised a far-reaching modification of the common law which could not be carried into effect without an enabling Act of Parliament, or by regulation validly made pursuant to an Act of Parliament. On the other hand, it may be urged against this view that by recognizing the absolute immunity of members of the Belgian and French armies from the exercise of criminal jurisdiction by the courts of the United Kingdom, the jurisdictional agreements were declaratory of a rule of international law. According to this argument the relevant provisions of the agreements would have been part of the common law even before the conclusion of the arrangements between the Government of the United Kingdom and the Governments of Belgium and France. As a consequence no enabling legislation would have been necessary. In fact the attitude of the British Government and the English courts seemed to be wholly at variance with this contention.

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[1] The army of operations seems to have been regarded as that part of the army which was in the zone of operations.

[2] See, however, the interesting exchange of views between counsel and members of the Court of Criminal Appeal in *Aughet* v. *The King* (1918), 34 T.L.R. 302. Counsel for the Crown submitted that the Anglo-Belgian Convention 'only applied to soldiers in the field, that is to say in those places where active operations in the face of the enemy were taking place and where the Allies were intermixed and questions of jurisdiction were likely to arise between the different countries'. Avory J.—'What is a field of battle? Is not London one at this time?' Lawrence J.—'Some of us have reason to think so.'

[3] Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 38.

The Mixed Court of Cassation in Egypt held that these agreements are so far from laying down any recognized principles of international law

> 'que les Etats-Unis d'Amérique ne parvinrent pas à obtenir du Gouvernement Britannique, pour leurs troupes séjournant en Angleterre, durant toute la durée de cette première guerre, les mêmes privilèges que ceux qu'ils obtinrent par leur Convention avec le Gouvernement Français . . .'.[1]

The negotiations between the Governments of the United Kingdom and the United States of America which the Mixed Court had in mind constitute significant and illuminating evidence of the attitude of those Governments towards the question whether the members of a visiting force are immune from the exercise of criminal jurisdiction by the local courts. The chief concern of the negotiations was to facilitate and legalize the exercise of jurisdiction by the service courts and authorities of the forces of the United States of America in the United Kingdom.[2] This object was gained by Defence of the Realm Regulation 45F. However, negotiations were continued thereafter for the conclusion of an agreement similar to those entered into by them with the French Government.[3] Such an agreement would have recognized the right of the service courts and authorities of the forces of the United States of America to exercise exclusive jurisdiction over members of their forces in the United Kingdom. It is probable that an agreement of this kind would have been concluded, had the cessation of hostilities, in the British view at least,[4] not rendered the negotiations purposeless. A careful scrutiny of the Notes exchanged between the two Governments reveals that neither of them regarded the members of the forces of the other when in its territory as being entitled to claim as of right immunity from the exercise of criminal jurisdiction by the local courts. There is no evidence in the negotiations for the contention that the provision in the proposed agreement recognizing the exclusive jurisdiction of the service courts of one contracting party over its armed forces in the territory of the other was thought to consecrate any universally accepted principle of international law.[1]

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[1] *Manuel* c. *Ministère Public*, *J.T.M.*, 15–16 March 1943, No. 3126, p. 4; *Bulletin* 55 (1943), p. 125. For translations of the judgment in this case see *Annual Digest*, 1943–5, Case No. 42, p. 160, and *A.J.*, 39 (1945), p. 349. For a consideration of the validity of the statement of the Court, which was based on an interpretation by King in *A.J.*, 36 (1942), p. 539 at pp. 551–3, see below, n. 3, and p. 200, n. 13.

[2] See Barton, loc. cit., at pp. 392–5.

[3] Draft agreements were exchanged between and approved by the two Governments. See *F.R.*, 1918, Supplement 2, pp. 753–60. There does not seem, therefore, to be any foundation for the statement in *Manuel* c. *Ministère Public*, *J.T.M.*, 15–16 March 1943, No. 3126, p. 4, that the non-conclusion of the agreement between the two Governments was due to the reluctance of the British Government to accept the proposals of the Government of the United States of America. Indeed, it was the British Government that by its Note of 26 April 1918 (*F.R.*, 1918, Supplement 2, pp. 744–5) asked whether the Government of the United States of America would be prepared to enter into an agreement which, subject to certain modifications, would be similar to that concluded between it and the French Government.

[4] *F.R.*, 1918, Supplement 2, pp. 759–60.

In determining the significance of the agreements concluded by the various Allied Governments attention must be paid to the circumstances in the territories to which they were applicable. Although all the agreements were expressed to be reciprocal, the range of territories in which they would come into operation was limited. The vast majority of the Allied forces were stationed in Belgium and France, and of these all but a few were concentrated in various sectors of a comparatively narrow and well-defined zone of operations. In these sectors the authorities of the Allied forces were armed with powers of administration not only over their own servicemen but also over the remnant of civilians who resided there.[2] The ample powers which were possessed by the authorities of the Allied forces in Belgium and France form a characteristic feature of an army of occupation by consent, and at the same time distinguish it from a visiting force which exercises authority over its own members only. There are persuasive reasons for recognizing that the members of an army of occupation by consent enjoy immunity from the exercise of criminal jurisdiction by the local courts, if these are still functioning. It follows therefrom that in so far as the jurisdictional agreements gave expression to this immunity they were declaratory of international law. But it does not follow that this is true of the application of the agreements to members of Allied forces outside the zone of operations.

The attitude of the Italian Government in its negotiations with the British Government concerning the exercise of jurisdiction over members of the British forces in Italy lends support to this view. In the north of Italy where fighting was in progress against the Central Powers and where the British forces occupied a sector in the zone of operations, the Italian Government did not hesitate to recognize the right of the British service courts to exercise exclusive jurisdiction over members of the British army. But although it recognized the right of the British service courts to exercise jurisdiction over members of the British army outside that zone, the Italian Government strenuously maintained that members of the British forces who committed offences against Italian law were liable to be tried in Italian courts. The British Government did not dissent from this view, but proposed that the two Governments should conclude a jurisdictional agreement similar to those which they had both signed with the French Government.[3] Although both Governments had agreed upon the contents of such a convention, the end of the war intervened before a final agreement could be signed.

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[1] For an altogether different interpretation of these negotiations see King in *A.J.*, 36 (1942), pp. 551–3.

[2] See Chalufour, op. cit., Part I, chaps. 2 and 4.

[3] Anglo-French Agreement of 15 December 1915, *London Gazette*, 31 December 1915, p. 13025, and the Franco-Italian Agreement of 18 August–1 September 1917, *J.O.*, 1 September 1917, p. 6915.

(*b*) *The inter-war period*

The Anglo-Egyptian Convention of 26 August 1936,[1] which is the only agreement it is proposed to consider here, has been chosen because of its far-reaching importance during the Second World War. The Convention was concluded pursuant to the provisions of the Anglo-Egyptian Alliance of the same date.[2] By the Treaty it was agreed that the military occupation of Egypt by the forces of His Britannic Majesty was terminated;[3] and that the continued presence of British troops in Egypt would 'not constitute in any manner an occupation and (would) in no way prejudice the sovereign rights of Egypt'.[4] The change in status of the British troops in Egypt from an army of peaceful occupation to that of visiting forces had profound consequences on the type and nature of immunities to which they were entitled. Prior to the Treaty there was no uncertainty about the position of the British forces in Egypt: they were completely exempt from the exercise of jurisdiction by the local courts.[5] After the Convention any immunity that they might claim from the exercise of criminal jurisdiction by the local courts had to be traced to the relevant provisions of Article 4 of the Convention which reads as follows:

> 'No member of the British Forces shall be subject to the criminal jurisdiction of the Courts of Egypt, nor to the civil jurisdiction of those Courts in any matter arising out of his official duties.'

Any case which did not come within the terms of this provision would be liable to be tried in the courts of Egypt. Attempts were made in four categories of offences to prove that the case did not fall within the terms of Article 4, and to assert the exercise of the residual jurisdiction of the courts of Egypt.

The first such attempt was based on the slight discrepancy in punctuation between the English text of the Convention and the French and Arabic translations of it which were incorporated into Egyptian municipal law. A member of the British forces, Spender, was charged with having committed an assault outside the course of his official duties. According to the French translation of the English text of Article 4 of the Convention[6] the accused would be subject to the exercise of criminal jurisdiction by the local courts, because the immunity of a member of the British forces from the exercise of criminal no less than civil jurisdiction by the courts of Egypt was qualified by the phrase 'in any matter arising out of his official duties'. The punctuation in the English text showed clearly that this qualification applied only to immunity from the civil jurisdiction of the courts of Egypt.[1] Faced with this dilemma the Mixed Court of Appeal at Alexandria, to which Spender had appealed from his conviction in the lower court, declined to decide upon the case until the Egyptian Government had been consulted through the *Procureur Général.*[2] In a letter of 6 March 1939 the Egyptian Government informed this official that

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[1] *U.K.T.S.*, No. 6 (1937), p. 23.

[2] Ibid., Art. 9.

[3] Ibid., Art. 1.

[4] Ibid., Art. 8.

[5] For an example of this absolute immunity from the exercise of jurisdiction by the Egyptian courts see *Amrane* c. *John*, *G.T.M.*, 24 (1934), p. 108, *Clunet*, 62 (1935), p. 195, *Annual Digest*, 1931–2, Case No. 90, p. 174, and *sub nom. Galila Bassionni Amrane* c. *John* in *Annual Digest*, 1933–4, Case No. 74, p. 187.

[6] 'Aucun membre des forces britanniques ne sera justiciable de la juridiction criminelle des tribunaux d'Egypte, ni de la juridiction civile de ces tribunaux, en aucune matière relevant de ses attributions officielles.'

> 'le membre de phrase "in any matter arising out of his official duties" doit être considéré comme se rapportant uniquement à la juridiction civile'.

Accordingly, in the resumed proceedings of the same case it was held[3] that the courts of Egypt were unable to exercise jurisdiction over Spender.

The second class of offences which were claimed to be subject to the exercise of criminal jurisdiction by the courts of Egypt were offences which had been committed by members of the British forces before they were incorporated in those forces. In the only case[4] to come before the courts this contention was rejected.

Another, and successful, attempt to withdraw a member of the British forces from the operation of the Anglo-Egyptian Convention was founded on a literal interpretation of Article 4 read in conjunction with Article 16 of the same Convention, which provided:

> 'The privileges and immunities provided for in the present Convention only apply to persons stationed with or attached to those forces of His (Britannic) Majesty who are present in Egypt in accordance with the provisions of the Treaty of Alliance and as further defined in Article 1 above.'

The accused, Holder, who had come to Egypt as a member of the British Merchant Marine, claimed that because he had deserted from the Royal Air Force in 1938 he was still subject to the Air Force Act of the United Kingdom and was thus entitled to claim as a member of the British forces, as defined in Article 1 of the Convention, immunity from the exercise of criminal jurisdiction by the courts of Egypt in respect of an offence which he was alleged to have committed in 1943. The Mixed Court of Cassation, before which the case came on appeal, held[1] that, although Holder may have been a member of the British forces, as defined in Article 1, he was not, in accordance with Article 16, stationed with or attached to any of the British forces which were present in Egypt pursuant to the Treaty of Alliance. He was, therefore, liable to prosecution in an Egyptian court for an offence committed by him against the law of Egypt.

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[1] See above, p. 194.

[2] *Ministère Public* c. *Spender*, *G.T.M.*, 28 (1938), p. 289, § 307, *Annual Digest*, 1938–40, Case No. 191, p. 478.

[3] *Ministère Public* c. *Spender*, *G.T.M.*, 30 (1939), p. 37, § 23. See also *Ministère Public* c. *Antonio Cachia*, ibid., 31 (1939), p. 60, § 53, where the court said: 'Les Tribunaux Mixtes ne sont dans aucun cas compétents en matière pénale pour connaître des infractions commises par les membres des Forces Britanniques, ces infractions fussent-elles commises en dehors de l'exercice de leurs fonctions.'

[4] *Ministère Public* c. *Shoheit*, *G.T.M.*, 31 (1940), p. 60, § 52.

Shortly after the Mixed Court of Cassation had delivered judgment in the case of *Holder* c. *Ministère Public*, a prosecution was launched against a member of the British forces who committed an offence while he was in a state of desertion. This constituted the fourth class of cases in which jurisdiction was claimed over members of the British forces. The Tribunal Correctionnel of Alexandria, relying upon the judgment of the Mixed Court of Cassation in Holder's case, rejected the submission of the accused, Péricléos, that it was precluded from entertaining the prosecution on the ground that Article 4 of the Anglo-Egyptian Convention of 26 August 1936 was applicable.[2] This interpretation of *Holder* c. *Ministère Public* disregarded the fundamental point on which it was decided. In that case the court held that Holder was subject to the exercise of the criminal jurisdiction of the local courts, not because he was a deserter, but because the forces to which he was originally attached did not form part of the British forces present in Egypt in accordance with the Anglo-Egyptian Treaty of Alliance. In *Périclėos* c. *Ministère Public* the detachment to which the accused had belonged at the time of his desertion two years before the offence was committed had been part of the British forces in Egypt. Notwithstanding the departure of his unit to Cyprus some months before the date of the offence, the connexion of the accused with the British forces in Egypt was sufficient, in the opinion of the Mixed Court of Cassation, to confer immunity from prosecution upon Périclėos.[3]

The significance of these efforts to establish exceptions to the apparently absolute immunities granted to the British forces in Egypt does not lie in their success or failure. They illustrate the metamorphosis which the British forces in Egypt had undergone. Whatever immunities these forces had enjoyed previously as an army in peaceful occupation of Egypt were now ended. In the new epoch the only derogations from the jurisdiction of the courts of Egypt which members of the British forces could claim were those, and only those, which flowed directly from the Anglo-Egyptian Convention of 26 August 1936. Therein lies the real importance of the cases we have considered.

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[1] *Holder* c. *Ministère Public, J.T.M.*, 2–3 August 1944, No. 3340, p. 4.

[2] *Ministère Public* c. *Périclėos, J.T.M.*, 16–17 August 1944, No. 3346, pp. 4–5.

[3] *Périclėos* c. *Ministère Public, J.T.M.*, 16–17 August 1944, No. 3346, p. 5. See also *Skoullou* c. *Ministère Public, Bulletin*, 59 (1947), p. 132, where the courts of Egypt exercised jurisdiction over a deserter from the British forces only because the British military authorities had informed the

(*c*) *The Second World War*[1]

As a consequence of the large number of states which were involved in the conflict the period of the Second World War was prolific in jurisdictional agreements regulating the exercise of jurisdiction by the service courts and authorities of one Allied force when visiting the territory of another. These agreements may conveniently be divided into three distinct types: (i) those which conferred no immunity on members of visiting forces from the exercise of criminal jurisdiction by the local courts; (ii) those which conferred an absolute immunity; and (iii) those which conferred immunity in respect of offences committed in certain circumstances only.

(i) *Agreements not providing for immunity*. With the single exception of the forces of the United States of America none of the forces of Allied countries which were stationed in the United Kingdom during the Second World War enjoyed immunity from the exercise of criminal jurisdiction by the British courts. In a series of jurisdictional agreements concluded between the British Government and most of the Governments-in-exile whose armed forces took refuge in the United Kingdom, it was provided that the members of the Allied force should be subject to trial in the local civil courts for offences against the criminal law of the United Kingdom. Article 2 of the Anglo-Czechoslovak Agreement of 25 October 1940,[2] whose terms appear in similar form in the agreements with the other Governments-in-exile,[3] stated that:

> '. . . Acts or omissions constituting offences against the law of the United Kingdom . . . shall be liable to be tried by the civil courts in the United Kingdom.'

Subject to the provisions of this article, the Agreement declared that

> 'jurisdiction in matters of discipline and internal administration over members of the Czechoslovak Land Forces in the United Kingdom shall be exercised in accordance with Czechoslovak military law, and offences against discipline shall be tried and punished accordingly by the Czechoslovak Military Courts and authorities.'[4]

To the extent that an offence against discipline in an Allied force was at the same time an offence against the law of the United Kingdom, the service courts and authorities of the Allied force were able to exercise jurisdiction

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court that after the date of the offence and while the accused was in a state of desertion he had been discharged from the forces.

[1] This term has been used in a technical sense.

[2] The relevant articles of this Agreement have been set out by Schwelb, 'The Jurisdiction over the Members of the Allied Forces in Great Britain', in *Czechoslovak Yearbook of International Law* (1942), pp. 155–6. See also Táborský, *The Czechoslovak Cause* (1944), pp. 122–4.

[3] Art. 4 of the Anglo-Polish Protocol of 22 November 1940—see Kuratowski in *Transactions of the Grotius Society*, 28 (1942), p. 1; Art. 3 of the Agreement with the Free French Authority of 15 January 1941; Art. 3 of the Anglo-Norwegian Agreement of 28 May 1941; Art. 3 of the Anglo-Netherlands Agreement of 5 May 1942—see *Militair-Rechtelijk Tijdschrift*, 39 (1946), pp. 102–3; and Art. 2 of the Anglo-Belgian Agreement of 4 June 1942.

[4] Anglo-Czechoslovak Agreement of 25 October 1940, Art. 1.

over the offender concurrently with the courts of the United Kingdom. Legally, there is no objection to the existence of concurrent jurisdiction over an offence. Conflicts between two tribunals as to which is the proper forum for the trial of an offence arise not because both are recognized as possessing concurrent jurisdiction, but because each believes that it alone has exclusive jurisdiction.[1] *Ex hypothesi* no such conflicts can arise between tribunals of concurrent jurisdiction. In practice the appropriate law enforcement agencies whose task it is to bring an offender before either tribunal arrive at an understanding as to which tribunal should take cognizance of the offence. This is the procedure adopted in the United Kingdom by the British civil and military police authorities when an offender has been arrested on a charge over which the civil and military courts have concurrent jurisdiction. It functioned satisfactorily in the United Kingdom during the Second World War in the collaboration between the Allied and Dominion[2] military authorities on the one hand and the British police[3] on the other.

There are two qualifications to the assertion that the service courts and authorities of Allied forces in the United Kingdom whose Governments had entered into jurisdictional agreements with the British Government were able to exercise jurisdiction concurrently with the courts of the United Kingdom. The first of these qualifications arose out of a limitation on the exercise of jurisdiction by the service courts of an Allied force over the offences of murder, manslaughter, or rape. It has long been the custom in the United Kingdom for the civil courts to have exclusive jurisdiction over these grave offences; it was therefore probably for reasons of uniformity with English municipal law that all the jurisdictional agreements contained a clause identical with that in Article 2 of the Anglo-Czechoslovak Agreement of 25 October 1940, which provided that

> 'The offences of murder, manslaughter, and rape shall be tried only by the civil courts of the United Kingdom. . . .'[4]

The prohibition against the exercise of jurisdiction over these three offences has no counterpart in the municipal law of the United Kingdom.[5] Consequently, there is justification for the suggestion of Cassels J. in *R.* v. *Navratil*[6] that the Czechoslovak military courts might have had jurisdiction over the accused who was a Czechoslovak soldier charged with manslaughter. It should be noted, in passing, that the right to exercise jurisdiction over these three major offences was restored to the service courts of the forces of the Belgian Congo in British West Africa[1] and of the Free French forces in British territory outside the United Kingdom.[2]

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[1] Cf. The case of the *S.S. Lotus*, *P.C.I.J.* (1927), Series A, No. 9.

[2] Whose jurisdiction was also concurrent with that of the civil courts of the United Kingdom.

[3] *Journal of Criminal Law*, 5 (1941), p. 72.

[4] See above, p. 197.

[5] Compare the Allied Forces Order, 1941 (Canada), P.C. 2546 of 15 April 1941, s. 3 of which specifically prohibits service courts of Allied forces in Canada from exercising jurisdiction over members of those forces for the offences of murder, manslaughter, and rape.

[6] *Annual Digest*, 1919–42, Supplementary Volume, Case No. 85, p. 164.

The second restriction on the exercise of jurisdiction by the service courts of the Allied forces in the United Kingdom was not limited to those whose Governments had entered into jurisdictional agreements with the Government of the United Kingdom. It was a municipal law restriction, applicable, with two minor exceptions, to all visiting forces in the United Kingdom. It is to be found in paragraph (3) of section 2 of the Allied Forces Act, 1940,[3] which provides as follows:

> 'A court [i.e., an allied service court] shall not have jurisdiction by virtue of the foregoing section[4] to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any such civil Court [in the United Kingdom] as aforesaid.'

(ii) *Agreements conferring absolute immunity*. The most important of the agreements securing for members of a visiting force absolute immunity from the exercise of criminal jurisdiction by the local courts was contained in an Exchange of Notes between the Governments of the United Kingdom and the United States of America on 27 July 1942.[5] In this agreement, which was the model for similar agreements between the Governments of the United States of America and of some other Allied countries, the Government of the United Kingdom undertook,

> 'subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces. . . .'[6]

In the opinion of the British Government this concession of immunity constituted a 'very considerable departure . . . from the traditional system and practice of the United Kingdom'.[7] A reading of the British Note and of the debates in both Houses of Parliament when the Bill implementing the Agreement was passed leaves it in no possible doubt that in the British view at least these arrangements were temporary and exceptional, dictated by the conditions of war and tolerated only because of the mutual feelings of comradeship between the contracting parties.[1]

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[1] Exchange of Notes between the Belgian and British Governments annexed to the Anglo-Belgian Agreement of 4 June 1942.

[2] Exchange of Notes between the British Government and the Free French Authorities of 30 April 1942.

[3] 3 and 4 Geo. VI, c. 51.

[4] S. 1 (1) which provided that: 'Where any naval, military or air forces of any foreign Power allied with His Majesty are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft, the naval, military and air force courts and authorities of that Power may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power.'

[5] Schedule to the United States of America (Visiting Forces) Act, 1942, 5 and 6 Geo. VI, c. 31; *E.A.S.* (1942), No. 355.

[6] Ibid., para. 1.

[7] Ibid., para. 3.

The Government of the United States of America concluded similar agreements with the Governments of Belgium (in respect of the Belgian Congo),[2] Canada,[3] China,[4] Egypt,[5] India,[6] and New Zealand.[7] The attitudes of these Governments towards the proposal that in their territory the service courts of the armed forces of the United States of America should exercise exclusive jurisdiction over members of those forces who commit offences are of real importance. The agreements with the Governments of India[6] and New Zealand[7] followed the wording of the Anglo-American Agreement of 27 July 1942[8] so closely that the attitude of those Governments can be said to be identical with the views of the Government of the United Kingdom mentioned above.

In the Exchange of Notes between the Governments of Egypt and the United States of America there appear statements which leave no room for doubt that in deciding 'to accord, for the duration of the war, immunity from jurisdiction in criminal matters to members of the United States Forces in Egypt'[9] the Egyptian Government considered that it was creating what it described as an 'exceptional régime'.[10] This Government declared that the grant of immunities was made 'only because of the special situation resulting from the war'[10] and was to 'terminate in all respects at the end of the war to permit the return to *normal law*'.[11] With this declaration, which was repeated by the Egyptian Minister of Foreign Affairs on the occasion of the signing of the jurisdictional agreement,[12] the Government of the

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[1] See below, pp. 208, 210.

[2] Agreement of 4 August 1943, *E.A.S.* (1943), No. 395.

[3] Exchange of Notes dated 27 December 1943, 10 February, and 9 March 1944.

[4] Agreement of 21 May 1943, *E.A.S.* (1943), No. 360, *U.N.T.S.*, vol. xiv, p. 353.

[5] Agreement of 2 March 1943, *E.A.S.* (1943), No. 356, *Bulletin*, 55 (1943), p. 8, *J.T.M.*, 5–6 March 1943, No. 3122, pp. 4–5.

[6] Agreement of 29 September and 10 October 1942, *E.A.S.* (1942), No. 392.

[7] Exchange of Notes dated 11 Deeember 1942–23 March 1943.

[8] Schedule to the United States of America (Visiting Forces) Act, 1942, 5 & 6 Geo. VI, c. 31; *E.A.S.* (1942), No. 355.

[9] *E.A.S.* (1943), No. 356, p. 1.

[10] Ibid., p. 2.

[11] Ibid. By using the term 'normal law' the Egyptian Note must have contemplated that the courts of Egypt would still be bound by the provisions of Art. 2 of the Montreux Convention whereby foreigners were not to be subject to Egyptian penal law except as provided by the principles of international law. This clause in the Note of the Egyptian Government may therefore be interpreted as declaring that the grant of immunity was to 'terminate in all respects at the end of the war to permit the return to' the application of the *general principles of international law*. For comments by the Mixed Court of Cassation on the general principles of international law and the Montreux Convention see *Manuel* c. *Ministère Public*, *Annual Digest*, 1943–5, Case No. 42, p. 156.

[12] *E.A.S.* (1943), No. 356, p. 17.

United States of America concurred.[1] It is only in the public announcement[2] made by the Egyptian Minister of Foreign Affairs immediately after the conclusion of the agreement that the first indication is given that in the view of the Egyptian Government the jurisdictional arrangements for the forces of the United States of America were not inconsistent with the general principles of international law. This last affirmation was repeated by the Minister in a message[3] to the Council of Ministers which contains the following passage:

> 'Selon le droit international, les membres d'une force armée se trouvant en territoire étranger jouissent de l'immunité de juridiction en matière pénale. La pratique internationale est que ces forces sont soustraites aux juridictions locales parce que l'exercice de la juridiction pénale par les chefs militaires est nécessaire au maintien de la discipline dans leurs troupes.'[4]

The Council of Ministers was further advised that the Agreement with the Government of the United States of America 'ne fait que consacrer une règle de droit international'.[5] In spite of the Minister's assurances it is difficult to regard an arrangement which is expressed to create an exceptional and temporary régime and which implies some deviation from normal law as being declaratory of any principle of international law. That very difficulty faced the Egyptian Government in connexion with the other Allied forces which were in Egypt.

If the agreement between the Governments of Egypt and the United States of America constituted a recognition of a generally accepted rule of international law, then the grant of immunity to the other Allied forces in Egypt should have coincided in content with the grant of immunity to the forces of the United States of America. When, however, that contention was advanced on behalf of a member of the Greek naval forces in Egypt, it failed to gain acceptance. In the first case[6] to come before the Mixed Courts of Egypt in which a member of an Allied force was involved the court had asked the Egyptian Minister of Justice for information as to the exact status of these forces and had received the reply that 'bien que jouissant du privilège d'exterritorialité, les Forces navales helléniques (to which the accused was attached) ne bénéficiaient pas des dispositions particulières soustrayant les Forces de Sa Majesté Britannique, en toute matière, à la juridiction des tribunaux de droit commun'.[7] However, after the Minister of Foreign Affairs had revealed the existence of an understanding between the Governments of Egypt and the United Kingdom as to the status of the Allied forces in Egypt, a second effort[1] was made to secure for a member of those forces immunity from the exercise of criminal jurisdiction by the local courts. In the case of *Sarnazos* c. *Ministère Public*[1] the Court instructed the *Procureur-Général* to request further elucidation from the Minister of Justice on the immunities which members of the Allied forces in Egypt were entitled to claim. In his letter of 8 April 1943 the Minister replied that:

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[1] *E.A.S.* (1943), No. 356, p. 9.

[2] *J.T.M.*, 5–6 March 1943, No. 3122, p. 1. See also the statement made by the Minister of Justice in the Egyptian Senate (*J.T.M.*, 10–11 May 1943, No. 3150, pp. 3–4).

[3] *J.T.M.*, 8–9 March 1943, No. 3123.

[4] Ibid., p. 1.

[5] Ibid.

[6] *Ministère Public* c. *Patsoulinis*, *J.T.M.*, 30–31 July 1941, No. 2873, p. 4.

[7] Ibid., p. 5.

> 'Lorsque le Gouvernement Egyptien a accordé au Commandement des Forces Helléniques, Polonaises, Tchèques, *etc.* le droit d'exercer la juridiction militaire et disciplinaire à l'intérieur de leurs unités, il n'a eu en vue que de leur accorder la situation juridique généralement reconnue aux troupes étrangères se trouvant en corps sur le territoire d'un autre Etat, laissant aux Tribunaux Egyptiens le soin de déterminer l'étendue de cette immunité dans les limites prescrites par le droit des gens et consacrées par la coutume internationale.'[1]

Accordingly, the Court held that Sarnazos did not enjoy the absolute immunity from prosecution which when granted to members of the forces of the United States of America was declared to flow from a rule of international law.[2]

At the conclusion of the protracted negotiations between the Governments of Canada and the United States of America for an agreement recognizing the right of the service courts of the forces of the United States of America to exercise exclusive jurisdiction over members of those forces who had committed criminal offences in Canada, the Canadian Government remained adamant in its opposition to the contention of the Government of the United States of America that the service courts of its forces in Canada were entitled as of right and in accordance with international law to exercise such jurisdiction. The exercise of jurisdiction by the service courts and authorities of the forces of the United States of America in Canada was regulated by a Canadian Regulation[3] conceding the right to exercise exclusive jurisdiction in certain circumstances. In a Note of 10 February 1944 commenting on the Canadian Regulation the representative in Canada of the Government of the United States of America said:

> 'I have been directed to say that as the Canadian Government is aware, my Government considers that under international law members of its armed forces in Canada are immune from the local jurisdiction in criminal matters.'

The representative then went on to say that 'as a matter of courtesy' the Government of the United States of America was prepared, subject to certain defined arrangements, to accept the procedure laid down in the Regulation whereby it undertook to submit any member of its forces surrendered to its authorities in Canada to trial before a military court of the United States of America. In his Note of 9 March 1944 the Canadian Secretary of State for External Affairs agreed that these arrangements would 'furnish a practical solution to the difficulty presented by the *difference* between the two Governments on the legal question[1] of the right of the service courts of the forces of the United States of America to exercise exclusive jurisdiction over members of those forces who commit offences in Canada. The Exchange of Notes with the Government of Canada was the only one in which the Government of the United States of America committed itself to an unequivocal declaration of its reliance on international law to support its view that the service courts of its armed forces had the right to exercise exclusive jurisdiction over its servicemen wherever they might be. It was also in this Exchange of Notes and in the preliminary negotiations that that declaration met its most emphatic refutation.

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[1] *Sarnazos* c. *Ministère Public, J.T.M.*, 10–11 May 1943, No. 3150, p. 3.

[2] See also the decision of the Mixed Court of Cassation in *Gounaris* c. *Ministère Public, J.T.M.*, 28–29 May 1943, No. 3158, p. 3, *Annual Digest*, 1943–5, Case No. 41, p. 152.

[3] P.C. 9694 of 20 December 1943. See below, pp. 211–12.

Agreements conferring on members of the British forces absolute immunity from criminal proceedings in friendly foreign territory were concluded by the Government of the United Kingdom with the Governments of Belgium[2] after the cessation of hostilities, of China,[3] of Ethiopia,[4] and of Portugal[5] in respect of the Azores. In none of these agreements was there any indication that immunity was claimed for or granted to the British forces as of right and in accordance with international law.

There is a further series of jurisdictional agreements which, because they make provision for absolute immunity from criminal proceedings for members of visiting forces, require to be considered. A feature of all these agreements is that they made provision for the exercise by the authorities of the visiting force of powers over persons other than members of those forces who may be found in certain demarcated areas. This concession of administrative powers characterized the friendly foreign force as an army in peaceful occupation, a situation with which the present article is not directly concerned. Agreements conceding such powers of administration to and conferring immunity from criminal proceedings on visiting forces were concluded by the Government of the United States of America with the Governments of Denmark[1] in respect of Greenland, of Iceland,[2] and of Panama;[3] and by the Government of the United Kingdom with the Government of Ethiopia,[4] and with the Free French Authorities[5] in respect of Madagascar. In this category may also be included the agreements made by the Government of the United Kingdom on behalf of the Allied Governments concerned with the Governments-in-exile whose territory was occupied temporarily by the Allied forces in the course of war operations against the common enemy. Such agreements were entered into with the Governments of Belgium,[6] France, the Netherlands,[7] and Norway.

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[1] Italics added.

[2] Agreement of 11 March 1946, Cmd. 6790.

[3] Agreement of 7 July 1945, *U.N.T.S.*, vol. xiv, p. 455.

[4] Agreement of 19 December 1944, Cmd. 6584. Art. 5(*a*) of the annexure to Art. VI of this Agreement provides: 'Save as hereinafter provided, no member of the Mission (which shall be a unit of the military forces of His Britannic Majesty) shall be subject to the criminal jurisdiction of the Courts of Ethiopia.'

[5] Agreement of 14 April 1945, Art. 4 of which provides: 'The appropriate British tribunals (which expression shall for the purposes of the present Agreement include Courts of Inquiry) shall have exclusive jurisdiction in criminal matters over all members of the British forces. The expression "British Tribunals" means the Naval, Military, or Air Force Courts, or officers of the force to which the person concerned belongs exercising jurisdiction under the Naval, Military, or Air Force Law of that force.'

(iii) *Agreements conferring qualified immunity.* Of all the jurisdictional agreements concluded during the period of the Second World War only one has been found which confers on members of a visiting force immunity from the exercise of criminal jurisdiction by the local courts in certain circumstances only. This was the Anglo-French Agreement of 19 April 1948.[8] In Article 4 (1) thereof it was provided as follows:

> 'The United Kingdom military authorities will exercise their exclusive jurisdiction in the case of an offence committed by a member of the United Kingdom Armed Forces in the following circumstances:
>
> '(*a*) When the victim of the offence is a member of the United Kingdom Armed Forces; or
>
> '(*b*) When the offence is contrary to United Kingdom military law but not to French law.
>
> 'In all other cases the French authorities will examine with the greatest consideration

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[1] Agreement of 9 April 1941, *E.A.S.* (1941), No. 204. Art. 6 provides: 'The Kingdom of Denmark retains sovereignty over the defense areas mentioned in the previous articles. So long as this Agreement shall remain in force, the Government of the United States of America shall have exclusive jurisdiction over any such defense area in Greenland and over military and civilian personnel of the United States and their families, *as well as over all other persons within such areas except Danish citizens and native Greenlanders. . . .*'

[2] Agreement of 1 July 1941, *U.N.T.S.*, vol. xii, p. 405.

[3] *Department of State Bulletin*, 6 (1942), p. 448.

[4] Agreement of 31 January 1942, Cmd. 6334. Cf. the Anglo-Ethiopian Agreement of 19 December 1944, Cmd. 6584.

[5] Agreement of 14 December 1942 between the Government of the United Kingdom and the French National Committee on the defence of the Island of Madagascar and its Dependencies and the Island of Reunion. Cmd. 6986, *U.K.T.S.*, No. 55 (1946).

[6] Agreement of 16 May 1944, *U.K.T.S.*, 1946, No. 19. Art. 1 provides: 'In areas affected by military operations it is necessary to contemplate a first or military phase during which the Commander-in-Chief of the Expeditionary Force on land must *de facto* exercise supreme responsibility and authority to the full extent necessitated by the military situation.' By Art. 7 it was provided that the Commander could exercise the power, after the resumption of Belgian civil administration, of bringing to trial before a military court any person alleged to have committed an offence against the persons, property, or security of the Allied Forces. For an example of unlawful exercise of this power see *Ministère Public* c. *Saelens et consorts*, *Pasicrisie Belge, Recueil général de la jurisprudence des Cours et Tribunaux de Belgique*, 1946, Part III, p. 42. The agreements with the Governments of France, the Netherlands, and Norway were similar to this Anglo-Belgian Agreement.

[7] For the text of some of the articles of this Agreement see François, *Handboek van het Volkenrecht* (1949), p. 562.

[8] *U.K.T.S.*, 1948, No. 44.

any request which may be received from the United Kingdom authorities, before a French Court has passed sentence, for the transfer of the accused before a United Kingdom Military Court.'

Provision for the exercise of exclusive jurisdiction in case (*b*) seems superfluous, for there can be little utility in securing immunity from the exercise of a criminal jurisdiction which does not exist. The test for securing immunity in case (*a*), however, is of considerable interest. It furnishes a circumstance in which two governments thought it advisable that exclusive jurisdiction should be exercised, but which has rarely been suggested as giving rise to immunity in any of the cases[1] whose records have been available for perusal.

(*d*) *The post-war system of mutual defence*

In contributions which have been made in recent years to the subject of the liability of members of a visiting force to criminal proceedings in a local court for an offence against the local law, writers[2] have assured their readers that almost all of the Western European states are firmly committed to the view that under international law there is no such liability. To support this contention reference is made to the jurisdictional agreements concluded by the Governments of Belgium and France during the First World War,[3] to the writings of British,[4] French,[5] and Netherlands[6] international lawyers, and, for confirmation of British state practice, to a statement of the Attorney-General in the House of Commons.[7] Viewed quantitatively and without any attempt at a critical analysis of the relevant material, this evidence may seem to support the proposition advanced by contemporary writers that in Western Europe states have recognized the existence of an obligation under international law to confer on members of a visiting force absolute immunity from the exercise of criminal jurisdiction by the local courts. According to such a view it would be a foregone conclusion that any arrangement between Western European states for the visit and sojourn of their armed forces abroad in one another's territory would make provision for the absolute immunity of members of those forces from criminal jurisdiction in the local courts.

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[1] See especially the judgment of Rand J. in *Reference re Exemption of United States Forces from Canadian Criminal Law*, [1943] S.C.R. 483, at p. 527. See also the judgment of Dixon J. in *Chow Hung Ching* v. *The King*, [1949] A.L.R. 29, at p. 50.

[2] See especially King, 'Jurisdiction over Friendly Foreign Armed Forces', in *A.J.*, 36 (1942), pp. 539 ff.; Schwelb, 'The Jurisdiction over the Members of Allied Forces in Great Britain', in *Czechoslovak Yearbook of International Law* (1942), pp. 147 ff.; Carneiro, '*A Extraterritorialidade da Fôrça Armada em Território Aliado*' in *Revista* 43 (1946), pp. 108–61; and Bathurst, 'Jurisdiction over Friendly Foreign Armed Forces: The American Law', in this *Year Book*, 23 (1946), pp. 338 ff.

[3] See above, p. 187, and see also Barton, loc. cit., pp. 387–90.

[4] For an enumeration of representative British writers see Bathurst, loc. cit., p. 339, n. 2.

[5] For an enumeration of representative French writers see ibid., n. 3.

[6] Van Praag, *Juridiction et Droit International Public* (1915), p. 493.

[7] *Official Report*, 21 August 1940, cols. 1404–5, vol. 364: 'When we have our forces in foreign territory, (we) ask for, and always get complete permission to apply our own military code.'

Contrary to this supposition, the multilateral Agreement concluded in the form of a treaty between heads of states by Belgium, France, Luxembourg, the Netherlands, and the United Kingdom relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers,[1] provided that members of a visiting force would, without exception, be subject to the exercise of criminal jurisdiction by the local courts. Paragraph 2 of Article 7 states:

> ' "Members of a foreign force"[2] who commit an offence in the "receiving State"[3] against the laws in force in that State can be prosecuted in the courts of the "receiving State".'

There is no concession of immunity for offences where the victim also is a member of the visiting force, where the offence is solely directed against the interests of the 'sending State',[4] where the offence is committed within the limits of the quarters occupied by the visiting force, or where the offence is committed at a time when the offender is on duty; all of which circumstances have been suggested as being appropriate occasions for the grant of immunity. The withdrawal of a member of a visiting force from the exercise of the criminal jurisdiction of the local courts is according to the Agreement—and, it is believed, rightly—a matter for the discretion of the local state. Paragraph 2 of Article 7, already quoted above, also provides:

> 'When the act is also an offence against the law of the "sending State", the authorities of the "receiving State" will examine with the greatest sympathy any request, received before the court has declared its verdict, for the transfer of the accused for trial before the courts of the "sending State".'

In certain types of offences[5] the Agreement declares that 'the authorities of the "receiving State" where the offence was committed will prosecute only if they consider that special considerations require them to do so'.[6] But even here the decision rests with the authorities of the local state and with them alone.

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[1] Cmd. 7868.

[2] By Art. 1(*a*) 'foreign force' means an armed force maintained by a contracting party in the execution of duties under the Brussels Treaty situated in the territory of another contracting party.

By Art. 1(*d*) 'members of a foreign force' means members of that force travelling or resident in the execution of their duties under the Brussels Treaty in the territory of a contracting party other than the 'sending State'.

[3] By Art. 1(*c*) 'receiving State' means the party in the territory of which the force is stationed or through which it is passing in transit.

[4] By Art. 1(*b*) 'sending State' means the party maintaining the force.

[5] Art. 7 (2): 'Where a "member of a foreign force" commits an offence against the security of, or involving disloyalty to, the "sending State" or an offence against its property, or an offence against a member of the force to which he belongs . . . .'

[6] Ibid.

By providing for the right of the service courts and authorities of the visiting force to exercise jurisdiction over members of that force who may have committed offences against the local law,[1] it is believed that the Agreement fulfills an obligation incumbent upon the local state under the generally accepted principles of international law. At the same time its provisions subjecting members of the visiting force to liability to trial in the local courts for offences against the local law are declaratory of the rules of international law relating to the exercise of jurisdiction over visiting forces.

III. *Municipal legislation*

Under this head it is proposed to consider legislation in four countries, namely, the United Kingdom, Canada, Australia, and the United States of America. Our choice has been influenced by several factors: first, because the United Kingdom furnishes examples of legislation in both the First and Second World Wars; secondly, because the United Kingdom, Canada, and Australia, being members of the British Commonwealth of Nations, enacted significant legislation on the status of visiting Commonwealth forces in each of their countries; thirdly, because these three countries received considerable numbers of Allied forces into their territory during the Second World War, and conceded immunity from criminal prosecution only to the members of the forces of the United States of America; and, fourthly, because it is of importance to discover the full extent of the immunities granted by the United States of America to members of visiting forces.

(*a*) *United Kingdom*

During the First World War the only legislation passed in the United Kingdom concerning Allied forces was Defence of the Realm Regulation 45F.[2] By this Regulation the exercise of jurisdiction by the service courts and authorities of Allied forces over members of those forces in the United Kingdom was declared lawful.[3] On the other hand, it contained no grant of immunity from the exercise of criminal jurisdiction by the courts of the United Kingdom.

After the Imperial Conference of 1926 a Committee was formed to inquire into the operation of Dominion legislation in the British Commonwealth. One of the topics this Committee was instructed to consider was the operation of Dominion laws governing the exercise of jurisdiction over members of forces from one Commonwealth country when in the territory of another. In its report this Committee stated that:

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[1] Art. 7 (2): 'The competent military authorities of the "foreign force" shall have, within the "receiving State", any jurisdiction conferred upon them by the law of the "sending State" in relation to an offence committed by a member of their own armed forces.'

[2] Order of 22 March 1918, *S.R. & O.*, 1918 (No. 367), i, p. 332.

[3] Ibid., s. 1 (1).

> 'In connection with the exercise of extra-territorial legislative powers, we consider that provision should be made for the *customary extra-territorial immunities* with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter.'[1]

The legislation which was passed in almost every country of the Commonwealth[2] to implement this recommendation after its adoption by the Imperial Conference of 1930 ensured the right of the service courts and authorities of a visiting Commonwealth force to exercise jurisdiction over members of that force without interference from the exercise of supervisory jurisdiction by the local courts.[3] In none of the countries of the Commonwealth did such legislation confer on members of forces from another Commonwealth country immunity from the exercise of criminal jurisdiction by the local courts. It is noteworthy that it has never been suggested that failure to confer such jurisdictional immunity constituted a refusal to implement the above-mentioned recommendation of the Committee on the operation of Dominion legislation. Had immunity from the exercise of criminal jurisdiction by the local courts been regarded as a 'customary extra-territorial immunity', there seems to be no reason to doubt that provision would have been made for it. The 'feeling of comradeship'[4] and the 'common legal tradition'[4] existing between the members of the British Commonwealth of Nations are no less real than those which existed in 1942 between the United Kingdom and the United States of America at the time of the passing of the United States of America (Visiting Forces) Act, 1942;[5] but neither in peace nor in war did any member of the Commonwealth claim absolute, or even qualified, immunity from the exercise of criminal jurisdiction by the local courts for its servicemen in the territory of another member.[6]

After the arrival of large numbers of Allied forces in the United Kingdom during 1940 it was essential to lay a foundation for the exercise of jurisdiction by the service courts and authorities of those forces. This was done in the Allied Forces Act, 1940.[1] Section 1 (1) provided that

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[1] *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation*, 1929, p. 17, s. 44 (Cmd. 3479). Italics added.

[2] United Kingdom—Visiting Forces (British Commonwealth) Act, 1933 (23 Geo. V, c. 6); Canada—The Visiting Forces (British Commonwealth) Act, 1933 (23 & 24 Geo. V, c. 21); Australia—Defence (Visiting Forces) Act, 1939 (No. 5 of 1939); New Zealand—Visiting Forces Act, 1939 (3 Geo. VI, c. 36); South Africa—Defence Act (Amendment) and Dominion Forces Act, 1932 (Act No. 32 of 1932); Newfoundland—The Visiting Forces (British Commonwealth) Act, 1940 (4 Geo. VI, c. 29).

[3] See Barton, loc. cit., pp. 396–400.

[4] See above, p. 200.

[5] 5 & 6 Geo. VI, c. 31.

[6] For a case where a court of the United Kingdom exercised jurisdiction over a Canadian serviceman accused of an offence against English law see *R.* v. *Thompson*, *Journal of Criminal Law*, 5 (1941), p. 306. See also ibid., pp. 72–3.

> 'the naval, military and air force courts and authorities of (any Foreign Power allied with His Majesty whose forces are for the time being present in the United Kingdom or on board any of His Majesty's ships or aircraft) may, subject to the provisions of this Act, exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power'.

Although this constituted a recognition of the right of the service courts of the Allied forces to exercise jurisdiction over members of those forces, there was no concession of the privilege of exercising exclusive jurisdiction over such members as had committed offences against the local law. Unlike the Visiting Forces (British Commonweath) Act, 1933,[2] which makes no express reference to the subject of criminal jurisdiction, the Allied Forces Act, 1940, provided in Section 2 (1) that

> 'Nothing in the foregoing section shall affect the jurisdiction of any civil court of the United Kingdom, or of any colony or territory to which that section is extended, to try a member of any of the naval, military or air forces mentioned in that section for any act or omission constituting an offence against the law of the United Kingdom, or of that colony or territory, as the case may be.'

This section ensured that, with the exception already discussed,[3] the service courts and authorities of the Allied forces would be enabled to exercise jurisdiction concurrently[4] with the courts of the United Kingdom over members of those forces who had committed offences against the law of the United Kingdom. Even the prior exercise of jurisdiction over an offender belonging to an Allied force by the service courts of that force was not to preclude the courts of the United Kingdom from entertaining a prosecution against him; in such case it was provided that in awarding punishment in a subsequent trial the civil court in the United Kingdom should take into account any punishment imposed upon the offender in the prior trial before the Allied service court.[5]

When the forces of the United States of America began to arrive in the United Kingdom during 1942, the provisions of the Allied Forces Act, 1940, were applied to them.[6] The military authorities of those forces, however, regarded their status under the Allied Forces Act, 1940, as unsatisfactory.[1] In an announcement of 15 January 1942 the office of the Judge-Advocate-General of the United States of America stated,[2] with obvious reference to Section 2 (1) of the Allied Forces Act, 1940:

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[1] 3 & 4 Geo. VI, c. 51.

[2] See above, p. 208, n. 2.

[3] See above, p. 199.

[4] It should be noted that during the course of the debate on the Allied Forces Bill the Attorney-General said: 'Although under clause 2 we do claim complete jurisdiction over all offences, in practice it is not, of course, claimed where an offence is committed within the lines and the life or property of one of our subjects is not involved' (*Official Report*, 21 August 1940, col. 1405, vol. 364).

[5] Allied Forces Act, 1940, s. 2 (2).

[6] United States of America (Visiting Forces) Order, 1942, *S.R. & O.* 1942, No. 966.

> 'A statute of a foreign country purporting . . . to subject personnel of our forces to trial by its courts is objectionable.'

Thus inspired, the Government of the United States of America commenced negotiations with the Government of the United Kingdom to secure for members of its forces in the United Kingdom absolute immunity from the exercise of criminal jurisdiction by the local courts. As a result of the request of the Government of the United States of America and after prolonged discussions the British Government entered into an undertaking, 'subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should . . . exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces'.[3] Parliament gave its authority in the United States of America (Visiting Forces) Act, 1942,[4] an enactment unique in British history. By Section 1 (1) of this statute it is provided that:

> 'Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America.'

That this immunity was regarded in the United Kingdom as exceptional is implicit in the Act itself.[5] It was so described by the British Government in the Notes which it exchanged with the Government of the United States of America and which were printed as annexes to the Act.

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[1] For a criticism of the Act by an American writer see King in *A.J.*, 36 (1942), p. 557.

[2] *Bulletin of the Office of the United States Judge-Advocate-General*, 1 (1942), p. 13.

[3] Schedule to the United States of America (Visiting Forces) Act, 1942, para. 1: *E.A.S.*, No. 355.

[4] 5 & 6 Geo. VI, c. 31. For some of the extensive literature on the Act see King in *A.J.*, 36 (1942), p. 558, in ibid., 40 (1946), p. 263, and in *A.B.A.J.*, 28 (1942), p. 859; Schwelb in *A.J.*, 38 (1944), pp. 59–61; Bentwich in *Mod.L.R.*, 6 (1942), p. 68; Goodhart in *A.B.A.J.*, 28 (1942), p. 762, and in *The Times* newspaper, 11 August 1942, p. 2*e*. For anonymous contributions see *Journal of Criminal Law*, 7 (1943), p. 73; *A.B.A.J.*, 28 (1942), p. 679; and *Sol. Jo.*, 86 (1942), pp. 219, 237. For a review of the exercise of exclusive jurisdiction under the Act see McNeil in *L.Q.R.*, 60 (1944), p. 356.

[5] This is apparent when its provisions are compared with s. 2 (1) of the Allied Forces Act, 1940, which originally applied to the forces of the United States of America in the United Kingdom. It should also be noted in passing that the long and short titles of the Act illustrate its *ad hoc* nature. In the long title the statute is described as 'An Act to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America, relating to jurisdiction over members of the military and naval forces of the United States of America'. The change from generality in the title of the Visiting Forces (British Commonwealth) Act, 1933, to particularity in the title of the United States of America (Visiting Forces) Act, 1942, is a reflection, not without significance, of the exceptional nature of the latter statute.

Section 1 of the Act does not divest the courts of the United Kingdom of jurisdiction; the prohibition against prosecuting criminal proceedings is directed to prosecutors both public and private. It would, however, be the duty of a court of the United Kingdom before which a charge had been brought against a person to discontinue criminal proceedings if it was satisfied in accordance with Section 2 that that person was a member of the military or naval forces of the United States of America. The conclusion that the courts of the United Kingdom had not been divested of jurisdiction is fortified by the proviso to Section 1 (1), which clearly assumes that the courts retain their jurisdiction unimpaired.

(*b*) *Canada*

In Canada the juridical status of the first Allied forces to be stationed in the country was governed by the Foreign Forces Order, 1941,[1] which had adopted the practice of the Allied Forces Act, 1940,[2] in applying to Allied forces the machinery created by the Visiting Forces (British Commonwealth) Act, 1933.[3] In content also the Foreign Forces Order was similar to the Allied Forces Act,[2] except that the former regulation contained express provisions prohibiting the service courts of visiting Allied forces from exercising jurisdiction over members of those forces who were alleged to have committed the offences of murder, manslaughter, or rape.[4] It will be remembered that although the jurisdictional agreements between the British Government and various Allied Governments-in-exile had imposed a similar prohibition on the service courts of the Allied forces in the United Kingdom, there was no provision of British municipal law which precluded such action by the Allied service courts.[5]

On the entry of the forces of the United States of America into Canada the provisions of the Foreign Forces Order, 1941, were applied to them.[6] The attitude of the Government of the United States of America in its negotiations with the Government of the United Kingdom during the First World War towards the removal of certain offences from the exercise of jurisdiction by the service courts of its forces[7] had established a precedent for its objection to the provisions of the Foreign Forces Order, 1941, which had a similar effect. Subsequently, the prohibition against the trial by the service courts of the forces of the United States of America of members of those forces for the offences of murder, manslaughter, or rape was removed by an amending Order in Council.[8]

As was its practice in other countries where its forces were stationed the Government of the United States of America pressed for the concession by the local Government of the right of its service courts to exercise exclusive jurisdiction over members of its forces. The view of the Canadian Government, as illustrated in the above-mentioned regulations, was that the service courts of the forces of the United States of America possessed the right to exercise such jurisdiction as was conferred upon them by the law of the United States of America. The Canadian Government did not concede that it was bound by any principle of international law to grant the service courts of a visiting force the right to exercise *exclusive* jurisdiction over members of that force. During the negotiations with the Government of the United States of America the Canadian Government submitted the whole question to the Supreme Court of Canada for its advisory opinion.[1] Although the Supreme Court of Canada advised by a majority opinion that there was no rule of international law that members of the forces of the United States of America were entitled to absolute immunity from criminal proceedings in Canadian courts,[2] the Canadian Government acceded to the request of the authorities of those visiting forces to have members of their forces who had been arrested on a charge of having committed an offence against the law of Canada handed over to them if they so desired.[3] Under the final amendment to the Foreign Forces Order, 1941, it was provided:[4]

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[1] P.C. 2546 of 15 April 1941.

[2] See above, pp. 208–10.

[3] See above, p. 208.

[4] The proviso to s. 3.

[5] See above, p. 198.

[6] P.C. 5484 of 26 June 1942.

[7] See *F.R.*, 1918, Supplement 2, pp. 744, 748–9.

[8] P.C. 2813 of 6 April 1943.

> '6. (1) Whenever a member of the forces of the United States of America is detained by any authority of Canada, the officer commanding the unit to which the said member belongs, or the officer commanding the nearest United States force, or the military or naval attaché of the United States Legation at Ottawa, or any commissioned officer authorized to act on their behalf may, by request in writing made not later than thirty days after a notice given pursuant to the next preceding section,[5] require the authority so detaining to release the said member to such person or persons as he may designate, and the authority so detaining shall thereupon release the member accordingly: provided that if such member has been admitted to bail in respect of any offence, such request in writing may be made to the judge or justice who has admitted the said member to bail and such bail shall thereupon be released.
>
> '(2) After a request in writing has been made as aforesaid no criminal proceeding shall be prosecuted in Canada before any court of Canada against the said member based on the offence in respect of which the said member was detained.'

The whole tenor of the Canadian war-time legislation is inconsistent with the conclusion, which some have drawn, that it constitutes evidence for a rule of international law creating an obligation on the local Government to accord to members of a visiting force immunity from criminal proceedings.

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[1] P.C. 2813 of 9 April 1943, s. 2.

[2] *Reference re Exemption of United States Forces from Canadian Criminal Law*, [1943] S.C.R. 483, [1943] 4 D.L.R. 11, *Annual Digest*, 1943–5, Case No. 36, p. 124. See below, pp. 220–1, 224–5, 227.

[3] P.C. 9694 of 20 December 1943.

[4] Ibid., s. 6.

[5] S. 5: 'Whenever a member of the forces of the United States of America is detained by any authority in Canada in respect of an offence, such authority shall forthwith notify the commanding officer of the member detained, or the commanding officer of the nearest United States force, or the military or naval attaché of the United States Legation at Ottawa, or such other officer of the forces of the United States of America as the said military or naval attaché may designate.'

In the United States of America (Visiting Forces) Act[1] enacted by the Canadian Parliament in 1947 there appears a provision, unequivocal and explicit in its term, declaring the liability of members of the forces of the United States of America in Canada to be subject to the exercise of criminal jurisdiction by the local courts. Section 4 states:

> '(1) Nothing in section 3 of this Act shall affect the jurisdiction of any civil Court in Canada to try a member of a United States force for any act or omission constituting an offence against any law in force in Canada. . . .'

The effect of this statute is to place the forces of the United States of America in Canada in exactly the same position as they were in under the Allied Forces Act, 1940,[2] in the United Kingdom before the passing of the United States of America (Visiting Forces) Act, 1942.[3] Succeeding, as it did, subordinate legislation which had conferred far-reaching immunities from criminal proceedings on members of the forces of the United States of America and being the latest legislative expression of the status of visiting forces, the statute gains added importance, and at the same time, by its enactment in permanent form, throws into sharp relief the exceptional and temporary nature of the regulations which preceded it.

(c) *Australia*

Like Canada and the other members of the British Commonwealth Australia had passed legislation to implement the recommendation of the Imperial Conference of 1930. By the Defence (Visiting Forces) Act, 1939, it was enacted that the service courts and authorities of forces visiting Australia from other Commonwealth countries could lawfully exercise jurisdiction over members of those forces when present in Australia.[4] Like the other Commonwealth legislation that statute does not confer on the service courts and authorities of a visiting Commonwealth force the right to exercise exclusive jurisdiction in criminal matters.

When considerable numbers of Allied forces came to Australia during the Second World War a regulation[5] was passed which dealt with the question of their jurisdictional status in terms almost identical with the provisions of the Allied Forces Act, 1940. In particular, the liability of members of visiting Allied forces to prosecution in Australian courts for offences against the law of Australia was declared in Section 4 (1) of the National Security (Allied Forces) Regulations, 1941, which followed closely the wording of

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[1] 11 Geo. VI, c. 47.

[2] See above, pp. 208–10.

[3] See above, pp. 210–11.

[4] S. 6 (1).

[5] National Security (Allied Forces) Regulations, 1941, S.R. No. 302 of 1941.

Section 2 (1) of the Allied Forces Act, 1940. The status of their forces under this Regulation was viewed with dissatisfaction by the authorities of the United States of America.[1] They requested and obtained from the Government of Australia the surrender of members of their forces who had been arrested by the Australian police and held for trial. By an amendment[2] to the National Security (Allied Forces) Regulations, applicable only to the forces of the United States of America, the authorities of those forces were given a first option to exercise jurisdiction over a member thereof who had been 'arrested or detained on a charge of having committed an offence against the law of the Commonwealth (of Australia) or of any State or Territory of the Commonwealth'. Upon the exercise of this option the offender ceased 'to be subject to the jurisdiction of the criminal courts in Australia'.[3] The surrender applied only when an offender had been arrested or detained on a criminal charge; if criminal proceedings had been commenced, the option was no longer exercisable. For this reason the amendment did not go far enough to meet the wishes of the authorities of the forces of the United States of America in Australia.[4] A new amendment was therefore passed providing that

> '. . . where any member of the United States Forces in Australia is arrested or detained on a charge of having committed, *or is summoned, charged, or otherwise proceeded against for having committed*, an offence against the law of the Commonwealth or of any State or Territory of the Commonwealth, the appropriate officer of the United States Forces shall be notified and, if he so requests—
>
> (*a*) *if the member has been so arrested or detained*, the member shall be handed over to him; *or*
>
> (*b*) *if the member has been so summoned, charged, or otherwise proceeded against, further proceedings in respect of the offence shall be stayed*,
>
> and *the member* shall thereupon cease to be subject to the jurisdiction of the Criminal Courts in Australia, and the appropriate Naval or Military Court constituted in accordance with the law of the United States of America applicable to the United States Forces in Australia may exercise in relation to the member such powers as are conferred upon it by that law.'[5]

If the 'appropriate officer of the United States Forces' did not make a request to the Australian authorities, the offender remained subject to the exercise of criminal jurisdiction by the Australian courts. It is apparent that these amendments to the National Security (Allied Forces) Regulations were drafted on the basis that there existed no rule of international law conferring on members of the visiting forces from the United States of

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[1] For an indication of their attitude see King in *A.J.*, 40 (1946), p. 266.

[2] S. 6 of S.R. No. 302 of 1941 added by an amendment of 27 May 1942, S.R. No. 241 of 1942. For reference to the full text of this amendment see below, n. 5.

[3] Ibid.

[4] See above, n. 1.

[5] Amendment of s. 6 of the National Security (Allied Forces) Regulations, 20 October 1942, S.R. No. 457 of 1942. The amendments to the original s. 6 have been italicized.

America immunity from criminal prosecution in the local courts; they contemplated the exercise of criminal jurisdiction by the Australian courts, subject only to the right of the 'appropriate officer of the United States Forces' to request the withdrawal of an offender from the cognizance of those courts.

(*d*) *Other countries in the Commonwealth*

The general legislation of the various parts of the British Commonwealth and Empire relating to the exercise of jurisdiction over members of visiting Allied forces has been mentioned elsewhere.[1] Where immunity from the exercise of criminal jurisdiction by the local courts was conferred on members of visiting forces, the legislation reproduced with slight and unimportant modifications the provisions of the United States of America (Visiting Forces) Act, 1942,[2] passed by the Parliament at Westminster.

(*e*) *United States of America*

It might be supposed that since the exercise of exclusive jurisdiction had in most instances been granted to the service courts and authorities of its forces over members of those forces when abroad, the United States of America would have had no hesitation in making a similar concession to foreign forces on its territory. It might therefore be expected that any legislation passed by the Congress of the United States of America on this subject would either prohibit the exercise of criminal jurisdiction by the local courts, as was done in the United Kingdom by the United States of America (Visiting Forces) Act, 1942,[3] or would have been enacted on the assumption that in the absence of legislation such jurisdictional immunity existed. There being no express grant of immunity from criminal prosecution in the only legislation passed by Congress[4] dealing with the jurisdiction of friendly foreign service courts in the United States of America, it is necessary to discover whether such immunity was assumed. It has been stated in a previous volume of the *Year Book*[5] that this was so;[6] but the author offers no proof of his statement. A careful reading of the recommendations of legislative committees and of the debates in the Senate reveals that, on the contrary, the existence of *exclusive* jurisdiction was not assumed,[1] nor was it considered advisable[2] or possible[3] for Congress to make such a concession to the members of friendly foreign forces in the United States of America.

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[1] Barton, loc. cit., p. 406.

[2] As to New Zealand see the United States Forces Emergency Regulations 1943, S.R. 1943/56, s. 5 (1). As to India see Allied Forces (United States of America) Ordinance, No. LVII of 1942, s. 2 (1). See also the similar Ordinance of 19 January 1946 granting absolute immunity to members of Chinese forces in India pursuant to the Anglo-Chinese Agreement of 7 July 1945, *U.N.T.S.*, vol. xiv, p. 455. This Ordinance is the Allied Forces (China) Ordinance (No. VIII of 1946).

[3] See above, p. 210.

[4] Public Law 384, 78th Congress (Chapter 326, 2nd Session), 58 Stat. 643, 22 U.S. Code 701–6. For a consideration of this legislation from the point of view of immunity of visiting forces from the exercise of supervisory jurisdiction by local courts see Barton, loc. cit., pp. 406–11.

[5] Bathurst, 'Jurisdiction over Friendly Foreign Forces: The American Law', in this *Year Book*, 23 (1946), p. 341.

[6] Ibid.: 'Public Law 384, 78th Congress . . . assumes the existence of this *exclusive* jurisdiction under international law and implements it. That this is the legislative intent is clear from the debate in the Senate reported in *Congressional Record* for 22 June 1944, pp. 6569 ff. (especially p. 6577, second column, Senator Revercomb).' The word 'exclusive' has been italicized.

IV. *Case law*

Decisions on the existence and extent of the immunity of members of visiting forces from the exercise of criminal jurisdiction by the local courts are not numerous. During the Second World War, however, courts of many countries were called on to consider these questions, and their judgments have contributed appreciably to the case law on the subject. It is proposed to examine some of the more important decisions under three heads: judgments in which the principle of absolute immunity from criminal prosecution was or is claimed to have been affirmed; judgments in which such absolute immunity was denied; and, finally, decisions in which immunity was recognized in certain defined circumstances.

(*a*) *Cases in which absolute immunity was or is alleged to have been affirmed*

It has been customary during the last century for writers and judges, when dealing with the subject of the immunities of members of visiting forces, to refer, usually in eulogistic terms, to some remarks of Chief Justice Marshall in the well-known case of *The Schooner Exchange* v. *M'Faddon*.[4]

The vast majority of writers and some judges have interpreted the Chief Justice's statements as relating to the exercise of criminal jurisdiction over members of a friendly foreign force. It is not considered necessary to repeat the arguments which have been advanced elsewhere[5] for interpreting this passage as providing cogent and convincing reasons in favour of accepting the view that there is an obligation on a host state to ensure that visiting forces enjoy immunity from the exercise of supervisory jurisdiction by the local courts. It may be convenient, however, to recapitulate the conclusions which the present writer reached in a previous consideration of the Chief Justice's statement. It was there asserted:[6]

> 'Clearly, the jurisdiction the exercise of which would interfere with the maintenance of discipline and prohibit the foreign general from using "that discipline and inflicting those punishments which the government of his army may require" is supervisory jurisdiction. To give the members of visiting forces access to this jurisdiction of the

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[1] The unqualified statement by Bathurst, loc. cit., is not borne out by the evidence. See *Congressional Record—Senate*, for 22 June 1944, pp. 6569 ff.

[2] Ibid., Senator Connally, p. 6577, col. 3.

[3] Ibid., Senator Murdock, p. 6572, col. 1.

[4] (1812), 7 Cranch 116, 3 U.S. Sup. Ct. Rep. (L.Ed.) 287.

[5] Barton, loc. cit., pp. 382–5.

[6] Ibid., at p. 385.

> local courts would mean the frustration of the exercise of disciplinary powers by the foreign authorities. On the other hand, to suggest that the exercise of the local criminal jurisdiction over a visiting force would necessarily impair its effectiveness is at once to under-estimate the number of its law-abiding members and to over-estimate the contribution each soldier makes to its general efficiency.'

This conclusion finds judicial support in the Australian case of *Wright* v. *Cantrell.*[1] There, in a judgment of characteristic lucidity, the Chief Justice of New South Wales subjected the statements of Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon*[2] to a penetrating analysis, and was unable to discover in them any basis for the proposition that members of visiting forces were absolutely immune from prosecution in local courts for offences against the local law.

In three later decisions the Supreme Court of the United States of America stated, *obiter*, that the judgment of the court in *The Schooner Exchange* v. *M'Faddon*[2] did support such a proposition. In the earliest of these cases, *Coleman* v. *Tennessee*,[3] the judgment of the Court was delivered by Field J. who said:

> 'It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government is exempt from the civil and criminal jurisdiction.'[4]

Within a year the same Justice, again delivering the judgment of the Court in the second case of *Dow* v. *Johnson*,[5] said:[6]

> 'As was observed in *Coleman* v. *Tennessee*, it is well settled that a foreign army, permitted to march through a friendly country, or to be stationed in it by authority of its sovereign or government, is exempt from its civil and criminal jurisdiction. The law was so stated in the celebrated case of *The Exchange*.'

In the last of this trilogy of decisions, *Tucker* v. *Alexandroff*,[7] Brown J., commenting on the judgment in *The Schooner Exchange* v. *M'Faddon*, said:[8]

> 'This case, however, only holds that the public armed vessels of a foreign nation may, upon principles of comity, enter our harbours with the presumed license of the government, and while there are exempt from the jurisdiction of the local courts; and, by parity of reasoning,[9] that, if foreign troops are permitted to enter, or cross our territory, they are still subject to the control of their officers and exempt from local jurisdiction.'

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[1] (1943), 44 S.R.N.S.W. 45, *Annual Digest*, 1943–5, Case No. 37, p. 133.

[2] See above, p. 216, n. 4.

[3] (1879), 7 Otto 509, 24 U.S. Sup. Ct. Rep. (L.Ed.) 1118.

[4] At p. 1122 of the Law Edition.

[5] (1880), 10 Otto 158, 25 U.S. Sup. Ct. Rep. (L.Ed.) 632.

[6] At p. 635 of the Law Edition.

[7] (1902), 183 U.S. 424, 46 U.S. Sup. Ct. Rep. (L.Ed.) 264.

[8] At p. 269 of the Law Edition.

[9] This is a strange inversion of the reasoning of Chief Justice Marshall. Even if it be assumed that in *The Schooner Exchange* v. *M'Faddon* the analogy of immunity for troops in passage was resorted to in order, ostensibly, to deduce therefrom the like immunity for foreign public armed vessels, there can be no justification in logic for taking Chief Justice Marshall's conclusion to prove the premiss of his syllogism.

Even if it is assumed that the statement in *The Schooner Exchange* v. *M'Faddon* had dealt with immunity from the exercise of criminal jurisdiction by the local courts, these *dicta* would give it an unwarranted extension. Chief Justice Marshall had limited his remarks to troops *in passage* and to them only. There can, therefore, be no justification for an interpretation which declares that he spoke of troops which had been given permission 'to be stationed' in the local territory, as was suggested in *Coleman* v. *Tennessee*[1] and *Dow* v. *Johnson*,[2] or simply to 'enter' the local territory, as was stated in *Tucker* v. *Alexandroff*.[3]

None of these three cases can be independent authority for the validity of the statements which have been quoted from them, because the question of immunity from criminal proceedings was not in issue in any of them. *Coleman* v. *Tennessee*[4] was solely concerned with the question whether a service court of the Federal Army in occupation of Tennessee during the Civil War had jurisdiction[5] to try a soldier for an offence committed there.[6] Whether Coleman was immune from the exercise of criminal jurisdiction by the local courts was therefore irrelevant. Moreover, Coleman was a member of an army of belligerent occupation, the juridical consequences of which have little similarity[7] with those which flow from a visit of a friendly force. In *Dow* v. *Johnson*[8] the Court was called upon to decide whether the commanding officer of a detachment of troops in belligerent occupation of Confederate territory during the civil war was subject to the civil jurisdiction of the local courts at the instance of an inhabitant of the occupied territory.[9] *Tucker* v. *Alexandroff*[10] dealt with the question whether a member of a visiting force in the United States of America could be arrested by the local authorities, not because he was alleged to have committed an offence against the local law, but because a request for his arrest had been made by the appropriate authority of the Government to which the visiting force belonged.

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[1] See above, p. 217. [2] See above, p. 217. [3] See above, p. 217.

[4] (1879), 7 Otto 509, 24 U.S. Sup. Ct. Rep. (L.Ed.) 1118.

[5] During the occupation Coleman had been convicted of murder by a court martial, but the sentence had not been executed. Some years later he was prosecuted for the same offence before a civil court of Tennessee. He pleaded *autrefois convict*. This plea was upheld by the Supreme Court of the United States of America on the ground that the court martial was a competent court to try the accused during the occupation of Tennessee. This is also the explanation of the decision of the Circuit Court of Kansas in *Hamilton* v. *McLaughry* (1905), 136 Fed. 445.

[6] Cf. *R.* v. *Aughet* (1918), 34 T.L.R. 302.

[7] The judgment of the Supreme Court was based, however, on an argument which assumed a fundamental similarity between a belligerent occupation and a friendly visit. Mr. Justice Field said: 'If an army marching through a friendly country would thus be exempt from its civil and criminal jurisdiction, *a fortiori* would an army invading an enemy's country be exempt.' It is noteworthy that Chief Justice Marshall made it quite clear that his remarks did not apply to troops which had come on to territory without the consent of the local sovereign. See *The Schooner Exchange* v. *M'Faddon* (1812), 7 Cranch 116 at pp. 140–1.

[8] (1880), 10 Otto 158, 25 U.S. Sup. Ct. Rep. (L.Ed.) 632.

[9] Cf. *Amrane* v. *John*, *Annual Digest*, 1931–2, Case No. 90, p. 174, and *sub nom. Galila Bassionni Amrane* v. *John*, *Annual Digest*, 1933–4, Case No. 74, p. 187.

[10] (1902), 183 U.S. 424, 46 U.S. Sup. Ct. Rep. (L.Ed.) 264.

A case which has been much quoted in writings on this subject is that of *The Republic of Panama* v. *Schwartzfiger.*[1] On the orders of his superior officer at France Field in the Canal Zone Schwartzfiger drove an injured workman to a hospital in Colon, outside the Canal Zone and within the territory of the Republic of Panama. In the course of the journey the ambulance, being driven at a speed in excess of the limits imposed by the local traffic regulations, collided with and killed a pedestrian. Schwartzfiger was prosecuted in the courts of Panama on a charge of involuntary manslaughter. In the Superior Court the charge was dismissed, mainly, it would seem, on the ground that accused had already been dealt with by the military authorities in the Canal Zone.[2] It was for different reasons, however, that the Supreme Court, to which the case was brought on appeal by the Republic of Panama, held that Schwartzfiger was immune from criminal proceedings in the Panamanian courts.

In adopting the opinion of the Procurador General the Court said:[3]

> 'It is a principle of international law that the armed force of one state, when crossing the territory of another friendly country, with the acquiescence of the latter, is not subject to the jurisdiction of the territorial sovereign but to that of the officers and superior authorities of its own command.'

From the facts of this case and some later remarks in the judgment it would appear that the Court gave clear recognition to a principle of qualified immunity only.[4] However, the above-quoted passage and other *dicta* of the Court, if given a literal interpretation, would seem to favour a principle of absolute immunity. Thus interpreted, they can only be explained with reference to the special circumstances governing the presence of forces of the United States of America from the Canal Zone in the territory of the Republic of Panama while acting on behalf of their own Government, as regulated by the provisions of the Hay-Varilla Treaty of 1903.[5] In fact this appears to be the basis of the judgment of the Court.[6] With its applicability restricted to the special circumstances of the case the decision can provide little, if any, support for a general rule of absolute immunity.[7]

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[1] *Registro Judicial*, 24 (1926), p. 772; *A.J.*, 21 (1927), p. 182; *Annual Digest*, 1927–8, Case No. 114, p. 180.

[2] *A.J.*, 21 (1927), p. 183.

[3] Ibid., p. 184.

[4] See Bathurst, 'Jurisdiction over Friendly Foreign Armed Forces: The American Law' in this *Year Book*, 23 (1946), p. 341.

[5] Martens, *Nouveou Recueil Général* (2$^{\text{ème}}$ sér.), vol. xxxi, p. 599. See also the opinion of the Procudor-General in *A.J.*, 21 (1927), p. 188: '. . . it is not possible, as a matter of law, *in view of the provisions of the above-mentioned treaty*, and because of the lack of jurisdiction of the national courts over him (Schwartzfiger) to hold him criminally responsible for the death of the (pedestrian).'

[6] See *Wright* v. *Cantrell* (1943), 44 S.R.N.S.W. 45, *Annual Digest*, 1943–5, Case No. 37, pp. 137–8.

[7] For the relationship to the Panamanian courts of members of the forces of the United States of America not covered by the Treaty see below, p. 223, n. 5.

A decision of an Italian military court has been considered[1] as evidence for the view that 'a crime committed on foreign territory by a member of (visiting) forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities'.[2] In this case, *In re Polimeni*[3], some observations were made which superficially affirm such a view; but as authorities for a general principle of international law their value is negligible.[4] Polimeni, a sergeant in the Italian Army, had been sent to the Saar as part of an international force to supervise a plebiscite in that territory. While in Saarbrucken he assaulted and inflicted grievous bodily harm on a corporal in the British Army. On his return to Italy he was prosecuted before a court martial of the Regiment to which he belonged. On his behalf it was contended that the prosecution should have been brought before the ordinary civil courts *in Italy*. In justifying the assumption of jurisdiction by the military court the prosecuting officer had simply to show that the Italian service courts had jurisdiction over the accused in the Saar, that they would have been able to exercise jurisdiction over him in the Saar, and that their failure so to exercise this jurisdiction before his return to Italy had not in any way impaired their right to try the case in Italy. The apparent conflict of jurisdictions was between the Italian military courts on the one hand and the Italian civil courts on the other: there was at no time any conflict between the local civil courts of the Saar and the Italian service courts. In the particular circumstances of the entry into the Saar of the international force of which the accused was a member it cannot be doubted that in fact the forces supervising the plebiscite were immune from the jurisdiction of the local courts. But this followed from their status as armed forces in occupation, and not from any general principle conceding immunity to visiting forces pure and simple.

Two Justices[5] of the Supreme Court of Canada in the important case of *Reference re Exemption of United States forces from Canadian Criminal Law*[6] held that 'there exists a rule of international law . . . granting immunity to organized forces visiting a country with the consent of the receiving Government'.[7]

In arriving at a similar conclusion Mr. Justice Kerwin relied to a great extent on the evidence of the jurisdictional agreements concluded between

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[1] Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 759, n. 3.

[2] Ibid., § 445, p. 759.

[3] *Foro Italiano*, 60 (1935), ii, p. 381, *Annual Digest*, 1935–7, Case No. 101, p. 248.

[4] The value of the case is further diminished by the fact that only the argument of the prosecutor (*avvocato militare*) has been reported.

[5] Kerwin and Taschereau JJ.

[6] [1943] S.C.R. 483, [1943] 4 D.L.R. 11, *Annual Digest*, 1943–5, Case No. 36, p. 124.

[7] Ibid., [1943] S.C.R. 483, at p. 514, *per* Taschereau J. A similar statement was made by Kerwin J.

France and her Allies in the First World War and on certain writings of French jurists[1] thereon. We have already noticed[2] the exceptional nature of the presence of the Allied forces in France at that time and its close assimilation to an occupation by consent, as indeed it is described by one of the writers[3] cited by the learned Justice. It may not be easy to accept the view that the factors which caused the Allied Governments to retain the exclusive jurisdiction of their courts martial over members of their armed forces in France during the First World War were applicable to the forces of the United States of America in Canada during the Second World War.

Another judicial examination of the question of the jurisdictional immunities of members of a visiting force was made by a judge of a Brazilian military court.[4] A marine of the forces of the United States of America in Brazil during the Second World War was arrested on a charge of having, while driving a military car in a state of intoxication, collided with a vehicle driven by a member of the Brazilian armed forces and having caused grievous bodily injuries to him. On the question whether the accused was entitled to absolute immunity from the exercise of criminal jurisdiction by the Brazilian military court the opinion of Auditor Carneiro was doubly *obiter*. In the first instance, the accused had committed the offence while he was on duty; therefore it was unnecessary to decide whether he would have been subject to prosecution, had the offence been committed when he was not on duty. Secondly, the Brazilian *military* courts were unable to exercise jurisdiction over the accused because he did not fall within either of the two relevant categories of persons over whom the military courts were empowered by Brazilian law to exercise jurisdiction. He was not a 'soldier' within the meaning of Article 6 (ii) (*a*) of the Military Penal Code, for that term envisages only Brazilian soldiers; nor was he one of the class of foreign soldiers[5] over whom the Brazilian court could exercise jurisdiction, because he was not commissioned in the armed forces of Brazil. It was on this ground that the case was dismissed.[6]

The sources upon which Auditor Carneiro mainly relied were the Military Codes of foreign countries and the writings of international lawyers. However, the provisions of foreign military codes are of little value as evidence of a rule of international law on this subject. If, for example, the Belgian Military Code declares that:

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[1] Chalufour, op. cit., pp. 46–54, and Clunet, *Clunet*, 45 (1918), p. 516.

[2] See above, p. 193.

[3] Clunet, loc. cit.: 'Quant aux armées alliées elles-mêmes, opérant en France, elles occupent *de facto* des portions de territoire. Bien que s'agissant d'une "occupation consentie", plusieurs suites de "l'occupation militaire", en général, en découlent.'

[4] Carneiro, *A Extraterritorialidade da Fôrça Armada em Território Aliado* (1946), chap. 2.

[5] 'Os militares estrangeiros, quando em comissão nas fôrças armadas brasileiros, ficam sujeitos à lei militar brasileira, ressalvado o disposto em convenções e tratados.' (Foreign military persons, when serving in commission with the Brazilian armed forces, are subject to the Brazilian penal law, except for contrary provisions in conventions and treaties.) See below, p. 229.

[6] Carneiro, op. cit., p. 10.

> 'A l'égard des délits spécifiés dans ce présent code et des peines y statuées, il ne sera jamais fait de distinction entre ces délits qui ont été commis dans l'intérieur de la Belgique et ceux qui l'ont été au dehors',[1]

and if, contrary to all canons of statutory interpretation, it is assumed that the Code declares that it applies to Belgian soldiers abroad to the exclusion of the exercise of jurisdiction by the foreign courts, there still remains unanswered the question how one country can by unilateral action endow its service courts in another country with exclusive jurisdiction over members of its forces there. But even in these codes there can be found an indication that members of the forces to which they apply may be tried in the courts of a country which the forces may visit. The Brazilian Military Code itself, which is quoted by Auditor Carneiro in his judgment,[2] declares:

> 'A lei penal militar aplica-se ao crime praticado no território nacional, e fora dêle, ainda que neste caso, *já tenha sido o agente julgado pela justiça estrangeira*.'[3]

This legislative admission that members of the forces of Brazil who may be abroad are liable to be prosecuted in the local courts constitutes a cogent refutation of the argument advanced by Auditor Carneiro.

(*b*) *Cases negativing absolute immunity*

There exists an imposing volume of decisions in which the courts have emphatically rejected the theory of the absolute immunity of members of visiting forces from the exercise of criminal jurisdiction by the local courts. The first of such decisions was given by the French Court of Cassation as long ago as 1868 in the *Affaire Der*. Machel Der was a member of the crew of a British naval corvette, H.M.S. *Pearl*, which at the time in question was anchored in the port of Saïgon in French Indo-China. While ashore he became involved in a fracas and assaulted a gendarme. The Tribunal Supérieur de Saïgon to which the accused had appealed against his conviction by the Tribunal de Police Correctionnel on a charge of assault held that, being a member of a foreign naval force on French territory by consent, the accused was immune from prosecution in the French courts. On further appeal, however, the Court of Cassation affirmed the conviction and upheld the exercise of jurisdiction by the Tribunal de Police Correctionnel at Saïgon.

Until the Second World War decisions on this subject were rare, being sometimes more important for the basic presuppositions underlying them than for their *ipsissima verba*, though occasionally these were of notable interest, as in *Tucker* v. *Alexandroff*[1] and in *R.* v. *Garrett, ex parte de Dryver*.[2] The fundamental presupposition that the local courts were not precluded from exercising criminal jurisdiction over a member of a visiting force was assumed by the English Court of Criminal Appeal in *Aughet* v. *The King*,[3] by a court of first instance in France in *Affaire H. Kurz*,[4] and by an international arbitral tribunal in the *Banks* arbitration[5] between Panama and the United States of America.

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[1] Cited in Carneiro, op. cit., p. 133.

[2] 'Military penal law applies to an offence committed on national territory and abroad, even though in the latter case the offender has already been tried by a foreign court.'

[3] *Sirey*, 1868, Part 1, p. 351.

Of the many cases decided during the Second World War it is possible to single out only a few for consideration. The first of these, which owes its importance to its being the sole judicial pronouncement by a court of the United Kingdom, was *R.* v. *Navratil*,[6] a decision of Mr. Justice Cassels at the Warwick Assizes. The accused, a Czechoslovak soldier, was charged with the manslaughter of a fellow Czechoslovak soldier. The offence took place in a camp occupied solely by Czechoslovak soldiers. For the defence it was contended, by way of reply to the insistence of the Crown that the Court had jurisdiction to entertain the charge pursuant to Section 2 (1) of the Allied Forces Act, 1940,[7] that that section applied only where the British court would have had jurisdiction or would have been enabled to exercise jurisdiction apart from the Act; that by a rule of international law the British courts were precluded from exercising jurisdiction over a member of a Czechoslovak force in the United Kingdom for a criminal offence; and that therefore the section was not applicable to the case. This contention made it necessary for the trial judge to discover whether there was such a rule of absolute immunity as relied upon by the accused. After an examination of some of the authorities cited by counsel the Court rejected the contention of the defence and held that it was not precluded from exercising jurisdiction over the accused in respect of the charge brought against him.

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[1] (1902), 183 U.S. 425, 46 U.S. Sup. Ct. Rep. (L.Ed.) 264. In this case it was realized that some qualification must be made to the literal interpretation given by Field J. in *Coleman* v. *Tennessee* and *Dow* v. *Johnson* (see above, p. 217) to the *dicta* of Marshall C.J. in *The Schooner Exchange* v. *M'Faddon*.

[2] [1918] 1 K.B. 6; (1917), 34 T.L.R. 13, at pp. 14–15. Commenting on the acquittal of Aughet by the Belgian court martial at Calais Darling J. said: 'That, however, in no way deprived the English court of jurisdiction; . . . In any case nothing that had taken place at Calais could oust the jurisdiction of the English court.'

[3] See above, pp. 189–91.

[4] *Clunet*, 45 (1918), p. 457. The accused, a citizen of the United States of America, had become a member of a Governmental Mission to France in 1916. He was discharged and on 17 June 1916 was served with a deportation order by the French authorities. On 13 June 1917 he returned to Paris as Chief Secretary in the Air Section of the General Staff of the Commander-in-Chief of the forces of the United States of America. The accused was then subject to military law and wore a military uniform. He was arrested by the French authorities on a charge of disobeying the deportation order, tried, convicted, and sentenced to a month's imprisonment.

[5] *American and Panamanian General Claims Arbitration* (Report of Bert L. Hunt), p. 117.

[6] *Annual Digest*, 1919–42, Supplementary Volume, Case No. 85, p. 161.

[7] 'Nothing in the foregoing section [section 1 (1)] shall affect the jurisdiction of any civil court of the United Kingdom, or of any colony or territory to which that section is extended, to try a member of any of the naval, military or air forces mentioned in that section [i.e. of an allied force] for any act or omission constituting an offence against the law of the United Kingdom, or of that colony or territory, as the case may be.'

In a judgment of persuasive power Chief Justice Jordan of the Supreme Court of New South Wales in *Wright* v. *Cantrell*[1] concluded

> 'that the doctrine of complete immunity which has been contended for . . . is not only completely lacking in what has been described (as) "the hallmarks of general assent and reciprocity", but is also inconsistent with the implications of local legislation.'[2]

The case was a civil action for damages brought against the defendant, who, though a British national, was subject to the military law of the United States of America. The defendant submitted that because of his status he was by virtue of a principle of international law completely immune from the process of the Australian courts. The learned Chief Justice examined the authorities relied upon by the defendant and especially the *dictum* of Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon.*[3] In his opinion he could find in them no basis for the theory of absolute immunity.

Under certain statutory powers the Governor-General of Canada in Council may refer questions of law to the Supreme Court of Canada for its consideration. In exercise of these powers there was referred to the Supreme Court the following question[4]:

> 'Are the members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?'

By a majority[5] the Court answered that there was no rule of international law conferring absolute immunity on the members of the forces of the United States of America in Canada.[6] The Chief Justice of Canada, with whom Mr. Justice Hudson concurred, founded his judgment on the constitutional principle by which 'a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts'.[1] To apply such a constitutional principle, which, as Mr. Justice Rand pointed out in the same case,[2] is a bastion not against foreign but against domestic military usurpation, to visiting forces from a friendly state may lead to difficulties, particularly when the constitutional law of the state from which the forces come does not recognize this principle. However, after a consideration of the practice of the British Government, from which he concluded that the United Kingdom 'never assented to any rule of international law by which British courts [were] restricted in their jurisdiction in respect of visiting armies or members of them',[3] the Chief Justice found that this constitutional principle applied to the members of the forces of the United States of America in Canada. In his opinion, which will be mentioned below, Mr. Justice Rand also recognized the relevance of this constitutional principle, but did not apply it as rigorously as the Chief Justice had done.

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[1] (1943), 44 S.R.N.S.W. 45, 61 W.N.N.S.W. 38, *Annual Digest*, 1943–5, Case No. 37, p. 133. For comment thereon see *A.L.J.*, 18 (1944), pp. 173 ff.

[2] *Annual Digest*, 1943–5, Case No. 37, at p. 140.

[3] (1812), 7 Cranch 116.

[4] P.C. 2931 of 9 April 1943.

[5] Sir Lyman Poore Duff C.J., Hudson and Rand JJ., Kerwin and Taschereau JJ. dissenting. For a consideration of the judgments of the minority see above, pp. 220–1. It will be noticed that a majority (Kerwin, Taschereau, and Rand JJ.) were expressly or by implication in favour of qualified immunity.

The value of this judgment as evidence of the existence of a rule of international law on the subject of jurisdiction over members of a visiting force is enhanced by the fact that the Court had before it a carefully prepared memorandum submitted by the Government of the United States of America through the good offices of the Canadian Minister of Justice. In this memorandum the Government of the United States of America contended that its forces in Canada were entitled by virtue of a principle of international law to absolute immunity from the exercise of criminal jurisdiction by the Canadian courts.

[6] *Reference re Exemption of United States Forces from Canadian Criminal Law*, [1943] S.C.R. 483, [1943] 4 D.L.R. 11, *Annual Digest*, 1943–5, Case No. 36, p. 124. For a lucid review of the judgments in this case see Wilson in *Can. B.R.*, 21 (1943), p. 593, as amended ibid., at p. 665.

The most fecund source of jurisprudence on the question of the exercise of criminal jurisdiction by local courts over members of a visiting force was the Mixed Courts of Egypt.[4] One of the earliest and most important cases was the decision of the Mixed Court of Cassation in *Triandafilou* c. *Ministère Public*.[5] The accused, a member of the crew of a Greek warship anchored in Egyptian waters with the consent of the Egyptian Government, was detailed by his superior officer to purchase provisions on shore with instructions to return on board by midnight. Before that hour the accused became involved in a brawl in the course of which he stabbed a policeman with a dagger. He was arrested by the local police and put on trial. In his plea to the jurisdiction of the court the accused contended, *inter alia*, that, being a member of a friendly foreign force in Egypt, he was, by virtue of a rule of international law, immune from the exercise of jurisdiction by the Egyptian courts. The Court concluded that there did 'not exist in fact any usage of international law which legally (limited) the sovereignty of the country where the ship (was) found'.[6]

In *Malero Manuel* c. *Ministère Public*[7] the Mixed Court of Cassation, dealing with the case of a soldier who had committed an offence outside his camp and at a time when he was not on duty, again rejected categorically the theory of absolute immunity. After a comprehensive review of the authorities adduced on behalf of the accused the Court said:

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[1] [1943] S.C.R. 483, at p. 497.

[2] Ibid., at p. 525.

[3] Ibid., at p. 496.

[4] See Brinton in *A.J.*, 38 (1944), pp. 378–82, and ibid., 40 (1946), p. 737. The latter article contains a convincing justification of the decisions of the Mixed Courts which had been criticized by King in *A.J.*, 40 (1946), pp. 258–62. See also Pathy in *Clunet*, 67–72 (1940–5), p. 390.

[5] *Bulletin*, 54 (1942), p. 259, *Annual Digest*, 1919–42, Supplementary Volume, Case No. 86, p. 165, *A.J.*, 39 (1945), p. 345.

[6] *A.J.*, 39 (1945), p. 346. This decision was followed by the same court in *Gaitanos* c. *Ministère Public, Bulletin*, 54 (1942), p. 257, *Annual Digest*, 1919–42, Supplementary Volume, Case No. 87, p. 169.

[7] *Bulletin*, 55 (1943), pp. 40, 125, *Annual Digest*, 1943–5, Case No. 42, p. 154, *A.J.*, 39 (1945), p. 349.

> 'To sum up, it is clear . . . that . . . there exists no generally recognized rule of international law which extends the principle of immunity from jurisdiction, in the case of a sojourn by foreign troops by consent, in respect of offences against ordinary law. . . .'[1]

The Court refused, both here and in *Ministère Public* c. *Tsoukharis*,[2] to draw any distinction between the case of a sailor ashore and of soldiers; and in *Stamatopoulos* c. *Ministère Public*[3] the same reasoning was applied to a member of a foreign air force.

In a decision[4] given in 1949 the High Court of Australia considered whether members of a visiting force were entitled, by virtue of a principle of international law, to immunity from criminal proceedings in the local courts. The judgments of the members of the Court[5] are inconclusive, because it was held that the accused, who were appellants before the Court, were not members of a visiting armed force.[6] It was on this ground that all the judges, with the exception of Chief Justice Latham, rejected the claim to immunity.[7] The Chief Justice also decided that as the appellants were not members of a visiting armed force, they were liable to prosecution in the Australian courts,[8] but before so deciding and without declaring which was the main ground for his judgment, he dealt with the contention of counsel for the appellants that their immunity was founded upon a rule of international law. The Chief Justice examined the authorities adduced on behalf of the appellants and concluded as follows:

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[1] *Annual Digest*, 1943–5, Case No. 42 at p. 161. See also *Stamatopoulos* c. *Ministère Public*, *Bulletin*, 55 (1942), p. 30, *Annual Digest*, 1919–42, Supplementary Volume, Case No. 88, p. 170, *A.J.*, 39 (1945), p. 347, and *Anne* c. *Ministère Public*, *Bulletin*, 57 (1943), p. 52, *Annual Digest*, 1943–5, Case No. 33, p. 116 (1).

[2] *Bulletin*, 55 (1943), p. 89, *Annual Digest*, 1943–5, Case No. 40, p. 150.

[3] See above, n. 1.

[4] *Chow Hung Ching* v. *The King*, [1949] A.L.R. 29.

[5] Latham C.J., Starke, Dixon, McTiernan, and Williams JJ.

[6] The appellants were two of a group of Chinese nationals who were present on the island of Manus in the trust territory of New Guinea. These Chinese men had been employed by the Chinese Ministry of Supply to collect surplus war equipment sold to the Chinese Government by the Government of the United States of America. They had undergone a period of training, before being sent to Manus. They did not carry any weapons, although they wore uniform and were under the command of an officer in the Chinese regular army. In giving evidence the commanding officer said: 'The two accused are of the same status as Chinese military personnel are. They passed military training before they left Shanghai. They are subject to military discipline while in Manus.' But, when this same witness was asked under cross-examination, 'When you say accused are subject to Chinese military law, do you mean as soldiers or civilian employees?' he replied, 'As employees of our Army, not as soldiers.' *R.* v. *Chow Hung Ching and Si Pao Kung*, Supreme Court of Papua, New Guinea, *Transcript of Proceedings*, pp. 36–37.

[7] [1949] A.L.R. 29, *per* Starke J. at p. 42, *per* Dixon J. at p. 51, *per* McTiernan J. at p. 52, *per* Williams J. at p. 52.

[8] Ibid., at p. 39.

'The result is that it has not been satisfactorily demonstrated that a general exemption from the application of local criminal law is implied in the permitted presence of foreign armed forces within Australia.'[1]

(*c*) *Cases recognizing immunity in certain defined circumstances.*

In many cases which have come before them courts have been persuaded that there is a rule of international law which in certain defined circumstances confers on members of a visiting force immunity from criminal proceedings in local courts. The two circumstances which have been most frequently cited as characterizing an offence over which the local courts should be unable to exercise their jurisdiction are when the offence is committed within the limits of the quarters occupied by the visiting force and when the offence is committed by a member of a visiting force while he is on duty. Other circumstances have been enumerated by courts but it will not be necessary to consider them in detail.

(i) *Offences committed within the limits of the quarters occupied by the visiting force.* The earliest case to qualify the supposed rule of absolute immunity which was claimed to have been propounded by Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon*[2] was *Tucker* v. *Alexandroff*,[3] where it was remarked by Mr. Justice Gray that the 'rule waiving the jurisdiction of the United States over a body of men' applied 'only to an armed force, segregated from the general population of the country and lawfully passing through or stopping in the country for some definite purpose connected with military operations'.[4]

In the *Reference re Exemption of United States Forces from Canadian Criminal Law* Mr. Justice Rand was of the opinion that

> 'members of the United States forces (were) exempt from criminal proceedings in Canadian courts for offences under local law committed in their own camps . . .'.[5]

But even the concession of immunity in this circumstance was qualified, for it was not to apply to offences committed in camp 'against persons not subject to United States service law, or their property'.[6]

No instance has been found in which immunity for offences committed within camp by a member of a visiting force was contested before the Mixed Courts of Egypt. But in several cases the immunity from prosecution of offenders who had regained their ship without having been arrested was upheld.[7] This rule was thought, on principle, to apply to soldiers who had regained their camp before arrest and therefore *a fortiori* to soldiers who had committed an offence within their camp.[1] In *Malero Manuel* c. *Ministère Public*, a case which concerned an offence committed outside a camp, the Mixed Court of Cassation impliedly recognized immunity for offences committed within camps when it said:

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[1] [1949] A.L.R. 29, at pp. 37–38.

[2] (1812), 7 Cranch 116.

[3] (1902), 183 U.S. 425, 46 U.S. Sup. Ct. Rep. (L.Ed.) 264.

[4] Ibid., at p. 459 in the Law Edition. For a judicial interpretation of this passage see *Chow Hung Ching* v. *The King*, [1949] A.L.R. 29, at p. 50, *per* Dixon J.

[5] [1943] S.C.R. 483, at p. 527, *Annual Digest*, 1943–5, Case No. 36, p. 124.

[6] Ibid.

[7] See especially the leading case of *Anne* c. *Ministère Public*, *Annual Digest*, 1943–5, Case No. 33, p. 115, *Bulletin*, 47 (1943), p. 52, *J.T.M.*, 19–20 January 1944, No. 3256, pp. 3–5.

> 'There exists no generally recognized rule of international law which extends the principle of immunity from jurisdiction, in the case of a sojourn by foreign troops by consent, in respect of offences against ordinary law committed *outside* military establishments.'[2]

It is necessary to consider the juridical bases for the recognition by the Mixed Courts of Egypt of immunity in the case of offences committed by members of visiting forces within the limits of their camp. It is believed that one such basis can be found in an analogy drawn from Article 5 of the Anglo-Egyptian Convention of 26 August 1936[3] which provides that

> 'Without prejudice to the fact that British camps[4] are Egyptian territory, the said camps shall be inviolable and shall be subject to the exclusive control and authority of the Appropriate British Authority.'

By the terms of that article the British forces were accorded, subject to the provisions of the Treaty of Alliance and the Military Convention, the status of forces in peaceful occupation of the extensive areas defined as their camps. So great was the similarity between the position of the British camps in Egypt and leased territory that in one case it was strenuously contended before the Mixed Court of Cassation that a person who was not a member of the British forces was nevertheless subject to the exercise of the exclusive jurisdiction of the British authorities, because the offence with which he was charged had been committed within the limits of a British camp.[5] The assimilation of the camps of other Allied forces in Egypt to the camps of the British forces was an analogy which it was not difficult for the Mixed Courts to draw. Another reason can be found in the application by the courts of the generally recognized immunity from prosecution for members of a foreign force who commit offences against the local law on board a foreign warship within the territorial waters of the local state to the case of offences committed by members of a visiting force within its camp.

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[1] See the judgment of the Cour d'Assises in the case of *Svelozar* c. *Ministère Public*, *J.T.M.*, 24–25 August 1945, No. 3504, p. 3.

[2] *Annual Digest*, 1943–5, Case No. 42, p. 161, *J.T.M.*, 15–16 March 1943, No. 3126, p. 4.

[3] *U.K.T.S.*, 1937, No. 6, p. 24.

[4] By Art. 3 (*a*) of the Convention it is provided that 'The expression "British Camps" means —the areas or places which, by virtue of Article 8 of the Treaty (of Alliance) and the Annex thereto, have been allocated to the Forces of His Majesty and such other areas as may be so allocated by agreement of both Governments either in addition to or in substitution for the aforesaid areas, and including the temporary camps and bivouacs in the training and manœuvre areas authorized by the Treaty when being used as such'.

[5] *Papanicolaou* c. *Ministère Public*, *Bulletin*, 58 (1946), pp. 92–93.

The Supreme Court of Brazil in the case of *In re Gilbert*[1] affirmed the immunity of members of a visiting force from criminal proceedings in the local courts for offences committed within the limits of the camp occupied by the force. While standing at the gate of Admiral Ingram Camp at Recife which was occupied by forces of the United States of America, the accused, who was a marine in those forces, shot and killed a Brazilian citizen who insisted on attempting to enter the camp to obtain payment of a debt owed him by another marine. One of the grounds upon which the Court held that it was unable to exercise jurisdiction over the accused was because the offence had been committed within the limits of the quarters occupied by the forces to which he belonged. Barros Barreto J. said:[2]

> 'I reach the same decision as the Honourable Judge Rapporteur [in upholding the immunity of the accused] because the place in question was designated by the Brazilian Government strictly as an American military area with the result that the American courts martial have [*semble* "exclusive"] jurisdiction to decide the case.'[3]

In one case, however, the Court refused to accept the contention that a member of a visiting force was entitled to immunity from criminal proceedings in the local courts, because the offence with which he was charged had been committed within the limits of the camp occupied by the visiting force. In *R.* v. *Navratil*,[4] the facts of which have already been given,[5] the trial judge said:

> 'It is said that I ought to take into consideration the fact that only Czechoslovak soldiers and citizens are concerned in that matter, which, in fact, arose within the lines of the camp . . . if that were so, it would mean that, wherever there were foreign armed forces stationed in this country, there could be committed within the lines of their camp every conceivable offence against our law, which our courts would be quite unable to entertain at all. That is not so.'[6]

[1] *Diário da Justiça*, 21 August 1945 (Jurisprudência-conflito de jurisdição, n.l. 520), p. 2969. The sole question in this case was whether the Brazilian *military* courts were able to exercise jurisdiction over the offender. The claim of these courts to try the case was weakened by the limitations on their own jurisdictional powers. Their only mandate to exercise jurisdiction over foreign soldiers was derived from Art. 6 of the Penal Military Code (Law-Decree No. 6,227 of 24 January 1944) which provided: 'Os militares estrangeiros, quando em commissão nas forças armadas brasileiros, ficam sujeitos à lei militar brasileira, ressalvado o disposto em convenções e tratados.'

[2] Ibid.

[3] Although in his criticism of this decision Accioly, 'Conflito de Jurisdições em Matéria Penal Internacional', in *Boletim da Sociedade Brasileira de Direito Internacional*, 1 (1945), p. 96, does not impugn the recognition by the Court of the existence of immunity in this circumstance, he argues persuasively that its application to the case was incorrect. He points out that in accordance with the almost universally accepted principles of criminal law the offence was committed where the consequences of the wrongful act were effected: in this case at the place where the victim was standing when he was shot, which was outside the perimeter of the camp.

[4] *Annual Digest*, 1919–42, Supplementary Volume, Case No. 85, p. 161.

[5] See above, p. 223.

[6] *Annual Digest*, 1919–42, Supplementary Volume, Case No. 85, at p. 165. Counsel for the accused had read to the Court a passage from Oppenheim, *International Law*, vol. i (1937), § 445, where it was declared that the local authorities are not competent to punish a member of a visiting force who commits a crime against the local law 'either within the place where the force is stationed or in some place where the criminal was on duty'. Of this statement, which has

(ii) *Offences committed while the member of the visiting force was on duty.* One of the earliest cases recognizing the immunity from criminal proceedings of a member of a visiting force who had committed an offence while he was on duty was *The Republic of Panama* v. *Schwartzfiger.*[1] There the Court said of the forces of the United States of America:

> 'Those forces *when acting in the name of or on behalf of the Government of the United States* are subject to the authority and jurisdiction to which they belong, and not to our national authorities.'[2]

The Mixed Courts of Egypt were again responsible for developing a body of case law which completely defined the limits of the immunity which they granted to members of visiting forces who were alleged to have committed offences while they were on duty. In *Triandafilou* c. *Ministère Public*[3] the offence with which the accused had been charged was committed at an hour when *ex facie* he was on duty. It was therefore contended that accused was immune from the exercise of jurisdiction by the local courts, on the ground that if there were no rule of international law recognizing the absolute immunity of members of visiting forces from local criminal proceedings, there was at least a rule of qualified immunity which withdrew from the exercise of the criminal jurisdiction of the local courts members of a visiting force who had committed an offence while on duty. This contention the Court accepted by an application of the principle contained in paragraph 3 of Article 20 of the Stockholm Resolutions.[4]

The principle of immunity for offences committed while the accused was on duty was applied to soldiers by the Mixed Court of Cassation in *Ministère Public* c. *Tsoukharis.*[5] In *Malero Manuel* c. *Ministère Public,*[6] decided a month later, it was argued on behalf of the accused that, unlike a sailor, a soldier was always on duty by the mere fact of his being on active service. This was, in reality, another argument for absolute immunity. Although the Court upheld its prior decision in *Ministère Public* c. *Tsoukharis,*[5] it refused to accept the proposition that a soldier was always on duty.

The Mixed Court of Cassation took the opportunity presented to it in

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been retained in the latest edition (ibid., 7th ed. by Lauterpacht, 1948, p. 760), the trial judge said: 'I am bound to say that the wording of the passage in Oppenheim is much wider than, in my opinion, is real law upon the subject' (at p. 164).

[1] *Registro Judicial*, vol. 24, 18 August 1926, p. 772, *A.J.*, 21 (1927), p. 182, *Annual Digest*, 1927–8, Case No. 114, p. 180.

[2] Ibid. Italics added. See Bathurst, loc. cit., p. 341.

[3] *Bulletin*, 54 (1942), p. 259, *Annual Digest*, 1919–42, Supplementary Volume, Case No. 86, p. 165, *A.J.*, 39 (1945), p. 345, *J.T.M.*, 13–14 July 1942, No. 3022, pp. 2–3.

[4] *Annuaire de l'Institut de Droit International* (1928), p. 743.

[5] *Bulletin*, 55 (1943), p. 89, *Annual Digest*, 1943–5, Case No. 40, p. 150, *J.T.M.*, 19–20 February 1943, No. 3116, pp. 2–5.

[6] *Bulletin*, 55 (1943), pp. 40, 125, *Annual Digest*, 1943–5, Case No. 42, p. 154, *A.J.*, 39 (1945), p. 349, *J.T.M.*, 15–16 March 1943, No. 3126, pp. 2–4.

Gounaris c. *Ministère Public*[1] of expounding the nature of the immunity enjoyed by a member of a visiting force for an offence committed while on duty. The observations of the Court would appear to be equally applicable to immunity for offences committed within camp. In this case the accused had while on duty become involved in a brawl in which a British soldier was killed. Proceedings on a charge of inflicting grievous bodily harm were instituted in the local courts, but until six months had elapsed no assertion of their right to exercise jurisdiction over the accused was made by the authorities of the foreign force to which he belonged. Accused contended that, since the offence was committed while he was on duty, the local courts had no jurisdiction at all to try him. But the Court said:

> 'The rule that the local courts have no jurisdiction is not absolute. Jurisdiction in fact *exists* all the time, but the question whether it is *exercised* or not depends on the attitude of the military authorities concerned.'[2]

In the case of *In re Gilbert*, which has already been discussed,[3] the accused was on sentry duty when he shot and killed a Brazilian citizen. This fact was regarded by the Court as being sufficient in itself to invest the accused with immunity from the exercise of criminal jurisdiction by the Brazilian courts.[4]

V. *Conclusions*

Where a series of international agreements make uniform arrangements on a given subject, it is not easy to decide whether they consecrate by formal recognition a generally accepted principle of international law or whether they constitute a deviation therefrom. This difficulty confronts us in assessing the exact significance of the jurisdictional agreements which have already been considered.[5] The weight of evidence lies, it is submitted, against accepting those agreements which conferred on members of a visiting force absolute immunity from criminal prosecution in the local courts as fulfilling an obligation under international law on the part of the local state. This was the conclusion of the Mixed Courts of Egypt when considering arguments based on the evidentiary value of these jurisdictional agreements.[6] Furthermore, it is noteworthy that the great majority of governments which entered into agreements of this type took care to place on record their view of the exceptional privilege they were conferring on the visiting force.[1]

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[1] *Bulletin*, 55 (1943), p. 156, *Annual Digest*, 1943–5, Case No. 41, p. 152.

[2] *Annual Digest*, 1943–5, Case No. 41, p. 153. For the detailed rules laid down by the Mixed Courts of Egypt and defining the limits of immunity for offences committed while the accused was on duty see *Triandafilou* c. *Ministère Public*, *J.T.M.*, 13–14 July 1942, No. 3022, pp. 2–3; *Ministère Public* c. *Tsoukharis*, *J.T.M.*, 19–20 February 1943, No. 3116, pp. 2–5; *Cambouras* c. *Ministère Public*, *J.T.M.*, 26–27 January 1944, No. 3259, pp. 2–4; *Gongoulis* c. *Ministère Public*, *J.T.M.*, 28–29 January 1944, No. 3260, p. 3; *Ministère Public* c. *Scordalos*, *J.T.M.*, 19–20 May 1944, No. 3308, p. 21; *Svelozar and Mijović* c. *Ministère Public*, *J.T.M.*, 24–25 August 1945, No. 3504, p. 3.

[3] See above, p. 229.

[4] Cf. Accioly, loc. cit., p. 101.

[5] See above, pp. 187–207.

[6] See the decision of the Cour d'Assises in *Malero Manuel* c. *Ministère Public*, *J.T.M.*, 10–11 February 1943, No. 3112, p. 5.

No consideration of jurisdictional agreements would now be complete without taking into account the impressive declaration contained in the only multilateral convention on the status of visiting forces. That convention, the Agreement relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers,[2] is of the greatest importance. Being intended, as it is, to govern the status of visiting forces for an indefinite period, both in peace and in war, the statement in Article 7 of the Agreement that 'members of a foreign force who commit an offence in the receiving State against the laws in force in that State can be prosecuted in the courts of the receiving State' furnishes a conclusive answer to those who maintain that agreements securing absolute immunity for members of a visiting force from criminal proceedings in the local courts constitute the norm of international law.

There is less difficulty, however, in extracting some principle from the implications of municipal legislation. From the examples that have been examined above[3] it is apparent that in the absence of some prohibition emanating from the local legislature the courts of a country which had consented to the entry of friendly foreign forces were entitled to exercise their jurisdiction over members of those forces. Moreover, the evidence adduced by local legislation is of particular importance because of the light it sheds on the practice of the United States of America on the subject of jurisdiction over members of a visiting force. Without the revealing debates in Congress[4] and the acceptance by the Government of the United States of America of the claim of the Canadian courts to exercise jurisdiction over its forces in Canada presented in the United States of America (Visiting Forces) Act which was passed by the Canadian Parliament,[5] there would have been powerful arguments to support the proposition that the Government of the United States of America at least continues to adhere to the position of absolute immunity. There seems to be now no longer any ground for asserting the existence of a divergency on this subject between the Government of the United States of America and the Governments of the British Commonwealth.

The weight of judicial decisions is overwhelmingly against the theory of absolute immunity for members of a visiting force from the exercise of criminal jurisdiction by the local courts. On the other hand, there is considerable authority for the proposition that if a member of a visiting force commits an offence within the limits of his camp or while he is on duty, then he is immune from criminal proceedings in the local courts.

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[1] See above, pp. 199 and 203.

[2] Cmd. 7868.

[3] See above, pp. 207–216.

[4] See above, p. 216, n. 1.

[5] See above, p. 213.

Do these qualifications accord with principle? It is universally admitted that the fiction of exterritoriality forms an unsubstantial basis for immunity in international law. Yet it is on this very fiction that both the above-mentioned qualifications are erected.[1] An offence committed by a member of a visiting force within the limits of the camp is not subject to trial in the local courts, because, so it is said, the offence has not been committed on local territory. With the exception of the judgment of Rand J.[2] in the case before the Supreme Court of Canada, this rule has not been relaxed. In general, decisions recognizing immunity in such circumstances draw no distinctions and would, it appears, apply the rule rigidly to offences committed against local inhabitants within the limits of the camp.

By a process of logic which still lacks satisfactory explanation some judgments have extended an immunity which had been restricted within territorial dimensions to an immunity which is measured in accordance with chronological dimensions. In according immunity to members of a visiting force from criminal proceedings in the local courts, if the offence with which the accused is charged has been committed during the period when the offender was on duty judges have expressly stated that the offender is clothed with the immunity of the camp or the warship, as the case may be. The Mixed Court of Cassation in *Triandafilou* c. *Ministère Public*[3] was urged to accept the contention of the accused that he was not subject to the exercise of the criminal jurisdiction of the courts of Egypt, because the offence for which he was indicted had been committed while he was ashore from his warship on duty. In accepting this argument the Court said:

> 'The only reason why the members of the crew of a warship enjoy any immunity ashore is that they are carrying out orders relative to the needs of the ship. In effect it is a case of extending the immunity of the ship itself outside the ship for the purpose of meeting its needs. This is the basis of the principle which withdraws these members of the crew from the local jurisdiction when they are on a mission (*service commandé*).'[4]

There is as little substance in the 'walking island' theory thus propounded as there was in the 'floating island' theory which was finally rejected by the Judicial Committee of the Privy Council in *Chung Chi Cheung* v. *The King*.[5] No satisfactory principle of international law can be based on such a premiss.

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[1] There can be no other explanation for the theory that an offence committed within a certain defined area is beyond the cognizance of a local court.

[2] See above, p. 227.

[3] See above, p. 230.

[4] *Annual Digest*, 1919–42, Supplementary Volume, Case No. 86, p. 169.

[5] [1939] A.C. 160.

It only remains to consider whether the rule of international law which declares that members of a visiting force are in all cases liable to criminal prosecution in the local courts can be sustained when subjected to the test of 'the reason of the thing', a test which has been for many writers the final arbiter between two apparently conflicting jurisdictions. It has been frequently argued that the exercise of jurisdiction over members of a visiting force would constitute such an interference in the command and discipline of that force, that its efficiency as a fighting unit would be gravely impaired. On examination it is evident that there is little substance in this contention. In the first instance, it ignores the fact that the service courts of the visiting force itself will, and are frequently under an obligation[1] to exercise jurisdiction over the offender and to commit him for trial at which officers will be required to devote themselves, often for several days, to the exacting task of establishing guilt or innocence. Secondly, it presupposes that the proportion of convictions in the local courts will be higher than in the service courts of the visiting force. Thirdly, it assumes that an offender who is either fined, or sentenced to a term of imprisonment or to death by a local civil court is of less value to a visiting force than an offender who may suffer these penalties at the hands of a service court. Fourthly, it disregards the fact that persons of criminal tendencies are the least likely to make any real contribution to the efficiency of a visiting force. Finally, it fails to take into account the fact that it has never been seriously suggested that the exercise of jurisdiction by the local courts over members of the *local* forces, as has been the practice for centuries in the United Kingdom, has in any way marred the efficiency of those forces or interfered with the maintenance of discipline.

That the service courts of a friendly foreign force on local territory are entitled as of right to exercise jurisdiction over members of those forces is undoubted. This includes the right to try a member of those forces for offences against the local law. But it has not yet been established that this right carries with it the right to exercise *exclusive* jurisdiction over members of those forces who commit offences against the local law. On the contrary, it has been shown that there exists a rule of international law according to which members of visiting forces are, in principle, subject to the exercise of criminal jurisdiction by the local courts and that any exceptions to that general and far-reaching principle must be traced to express privilege or concession.

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[1] See, for example, the Exchange of Notes between the Governments of the United Kingdom and the United States of America of 27 July 1942. See especially the Note of the Ambassador in London of the United States of America: 'In order to avoid all doubt, I wish to point out that the Military and Naval authorities will assume the responsibility to try and on conviction to punish all offences which members of the American Forces may be alleged on sufficient evidence to have committed in the United Kingdom.'

THE DUTY OF OBEDIENCE TO THE BELLIGERENT OCCUPANT

By MAJOR RICHARD R. BAXTER, B.A., LL.B.[1]

WHEN enemy territory has been subjected to belligerent occupation, the inhabitants of that area are commonly said to be under a duty not to commit acts which would jeopardize the security of the occupant. Violations of this duty of obedience are often described in terms of 'war treason' and 'war rebellion'. However, there has been no agreement on the questions whether the juridical basis for this obligation is to be sought in international law, in the municipal law of the occupied state, or merely in the superior force of the occupant and whether its violations may accurately be described in terms borrowed from municipal law. The ruthlessness and disregard for international law which have characterized the conduct of belligerent occupations during two world wars have raised these questions in a particularly acute form. Although the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 profited from experience gained since the adoption of Hague Convention No. IV of 1907, it did not purport to be a complete recodification of the law of belligerent occupation.[2] The fundamental question of the relationship existing between the inhabitant and the occupying Power remains for the most part a problem of the common law of war and is illuminated only fitfully by explicit provisions of the new Geneva Convention.

The protection of the civilian population of occupied areas against oppression by the occupant has consistently been a guiding principle of the law of belligerent occupation. In the changing tides of warfare it is essential that, to the maximum extent compatible with the conduct of hostilities, the civilian non-combatant should be safeguarded in his person, his property, his loyalties, and in the legal order to which he is subject. It is inevitable, however, that the inhabitants of an occupied area will chafe under enemy rule and under the restrictions placed upon them in the interest of the occupant's security and that they will in numerous instances, acting either singly or in concert, commit acts inconsistent with the security of the occupying forces. The occupant must undoubtedly have the means of dealing, and dealing severely, with such acts, whether or not they arise from hostile intent. It must be recognized, on the other hand, that there is a tendency for the occupant to project his anger indiscriminately upon the guilty and innocent alike and to impose excessive penalties on the wrongdoers when he is exposed to conduct prejudicial to his safety. On what juridical basis the legitimate protection of the occupant against hostile or dangerous acts may best be reconciled with the protection of civilians against arbitrary and unwarranted penalties and punishments is the problem to which this article is directed. To this end it will be necessary to consider the nature of the duty which the inhabitant owes to the occupant and the propriety of describing acts of resistance as 'war treason' or as 'war rebellion'.

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[1] Of the Judge Advocate General's Corps, United States Army. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Secretary of Defense, the Secretary of the Army, or the Judge Advocate General of the Army.

[2] Art. 154. See Gutteridge, 'The Geneva Conventions of 1949', in this *Year Book*, 26 (1949), pp. 318–19.

I. *The inhabitant's duty to the occupant*

As the law of belligerent occupation developed out of the law which was at one time applicable to conquered territory and ultimately attained an independent status, theories of the nature of the duty owed to the occupant by the inhabitants of the area he occupies have undergone a corresponding change.

1. *Allegiance*

Prior to the emergence of a distinct law of belligerent occupation during the second half of the eighteenth century and the early nineteenth century, enemy territory occupied by armed forces immediately became part of the territory of the occupying state.[1] The unqualified allegiance of the inhabitants of the area was, as a matter of course, demanded by the occupant, and their relationship to the occupant was left entirely to municipal law.[2] Thus when Louis XIV took Namur in 1692, the magistrates of the city came to him the next day to render him homage as his loyal subjects.[3] Although there were intimations in the great texts of the seventeenth century that mere belligerent occupation of territory is precarious and that the very uncertainty of the fortunes of war demands restraint in the exercise of belligerent 'rights',[4] it remained for Vattel and for Klüber and Heffter in the nineteenth century to assert that sovereignty over an occupied area does not pass to the occupant while hostilities are still in progress. Until a *debellatio*, normally in the form of a peace treaty, which determines the disposition to be made of the territory, the state whose territory it is is deprived only of the exercise of certain attributes of sovereignty.[5]

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[1] Nys, *Le Droit international. Les principes, les théories, les faits*, vol. iii (1912), p. 223.

[2] See, e.g., Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), § 892; Heffter, *Das europäische Völkerrecht der Gegenwart* (1st ed., 1884), § 132.

[3] Van Nispen tot Sevenaer, *L'Occupation allemande pendant la dernière guerre mondiale* (1946), p. 157.

[4] Grotius, *De Jure Belli ac Pacis* (1625), Book iii, Ch. vi, iv. 1; Pufendorf, *De Jure Naturae et Gentium Libri Octo* (1688), Book viii, Ch. vi, § 7.

[5] Vattel, *Le Droit des gens* (1758), Book iii, Ch. xiii; Klüber, *Droit des gens moderne de l'Europe* (1831), § 256; Heffter, op. cit., §§ 131–3.

The theory that an occupied territory immediately becomes part of the occupying state was slow to die. An English court could state in 1814 that: 'No point is more clearly settled in the Courts of Common Law than that a conquered country forms immediately part of the King's dominions.'[1] In 1875 Sir Travers Twiss still maintained that a belligerent nation taking possession of an enemy's territory acquires sovereignty over it.[2] A revision of de Martens' text which was published a decade earlier contains a statement that a state which makes itself master of an enemy province may demand homage from the inhabitants.[3] During the war between the United States and Mexico, General Kearney issued a proclamation absolving all persons residing in the occupied portion of Mexico from their allegiance to that republic and claiming them as citizens of the United States—an act which did not pass without criticism in Congress.[4] However, these are but isolated instances during a period of change. Already, during several wars of the eighteenth century, new theories of belligerent occupation had been given application.[5] A demand by the occupant for unqualified and permanent allegiance gradually ceased to have the sanction of law or of general practice.

2. *Temporary allegiance*

In Anglo-American law, as distinguished from that of the Continent, the relationship of the population of an occupied area to the occupant was, during a large portion of the nineteenth century, described in terms of *temporary* allegiance. This view is particularly apparent in the American jurisprudence of the period. It received its first statement in *United States* v. *Hayward*,[6] in which Mr. Justice Story made his celebrated statement that by the military occupation of Castine, Maine, by British forces, the inhabitants thereof passed under a temporary allegiance to the British Government. Subsequent opinions of the United States Supreme Court adopted this principle,[7] but in 1830 the Court tempered its holding by suggesting that the occupation of James Island and Charleston by the British in 1780, while causing the inhabitants to owe temporary allegiance to Great Britain, did not 'annihilate their allegiance to the state of South Carolina'.[1] This judicial characterization of the effect of belligerent occupation represented the state of the law during the war with Mexico and formed the basis of political pronouncements of the time.[2]

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[1] *The Foltina* (1814), 1 Dods. 450, 451, 165 E.R. 1374, 1375. Cf. *The Gerasimo* (1857), 11 Moo. P.C. 88, 14 E.R. 628, which indicates that, at least with respect to the question of the enemy character of occupied territory, the principle enunciated in *The Foltina* had by 1857 ceased to prevail.

[2] *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of War* (2nd ed., 1875), § 64.

[3] *Précis du droit des gens moderne de l'Europe* (2nd ed. by Vergé, 1864), § 280.

[4] *House Executive Document No. 19*, 29th Congress, 2nd Session, pp. 20 ff., cited in Thomas, *A History of Military Government in Newly Acquired Territory of the United States* (1904), p. 104. For a criticism of General Kearney's conduct, see the remarks of Mr. Holmes in *Congressional Globe*, 29th Congress, 2nd Session, p. 18.

[5] Nys, op. cit., vol. iii, p. 223. A number of historical instances are collected at pp. 227–33.

[6] (C.C. Mass. 1815), F. Cas. No. 15,336, 2 Gall. 485.

[7] *United States* v. *Rice* (1819), 4 Wheat. 246; *Fleming et al.* v. *Page* (1850), 9 How. 603; *Thorington* v. *Smith* (1868), 8 Wall. 1.

Repeated judicial affirmations of this principle left little room for dissent upon the part of American international lawyers. The duty of allegiance is, according to Halleck, writing in 1861, reciprocal to the duty of protection which rests on the occupant, but because of the incompleteness and instability of occupation, the allegiance is only a temporary or qualified one.[3] In fact, the civilian inhabitants of a place taken by the enemy who are allowed to lay down their arms and return to their peaceful pursuits are 'virtually in the condition of prisoners of war on parole'.[4] Other authors, in extending this characterization to the inhabitants of occupied areas generally, overlooked the fact that Halleck had been speaking of members of defending armed forces who had surrendered and been allowed to assume peaceful occupations.[5] The American writers often speak of an 'implied covenant' or an 'implied parole' to remain quiescent which is imputed to the inhabitants and forms the basis of their allegiance to the occupant.[6] During the nineteenth century Mr. Justice Story's remarks in *United States* v. *Hayward* were also quoted and approved by a number of British writers on the subject.[7]

The adoption of Article 45 of the Regulations annexed to Convention No. IV of The Hague of 1907, which forbade compelling the population of occupied territory to swear allegiance to the hostile Power, eventually made this theory untenable. The question of the exaction of an oath of allegiance had previously attracted relatively little attention. The United States *Instructions for the Government of Armies of the United States in the Field*, which came into use during the Civil War, had stated no more than that an oath of fidelity or temporary allegiance might be administered to civil officers in the occupied territory,[1] but Bluntschli's paraphrase of this provision carried an annotation to the effect that an 'oath of citizenship' could not be demanded in occupied territory until the conclusion of peace.[2] A provision substantially similar to Article 45 had originally been drafted at the Brussels Conference of 1874[3] and was repeated in the Oxford Manual prepared by the Institute of International Law in 1880.[4] With the unequivocal statement of the 1899 Regulations, which was repeated without further discussion in 1907,[5] it was hardly possible to argue that an inhabitant owed any duty of allegiance to the occupant. More recently, the Geneva Civilians Convention of 1949 has called attention to the fact that an individual in occupied territory who has committed an offence against the occupying Power is not to be considered as bound to the occupant by any duty of allegiance.[6]

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[1] *Shanks* v. *Dupont* (1830), 3 Pet. 242.

[2] In replying to Congressional inquiries concerning the administration of the occupied portion of Mexico, President Polk, in a message to the House of Representatives on 24 July 1848, stated that the inhabitants of this area owed a temporary allegiance to the United States. He quoted extensively from *United States* v. *Rice* (Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789–1897* (1897), vol. iv, p. 595).

[3] *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861), p. 791.

[4] Ibid., p. 793.

[5] See, e.g., Rolin-Jaequemyns, 'Chronique du droit international. Essai complémentaire sur la guerre franco-allemande dans ses rapports avec le droit international', in *Revue de droit international et de législation comparée*, 3 (1871), p. 312.

[6] Field, *Draft Outlines of an International Code* (1872), vol. ii, p. 482; Birkhimer, *Military Government and Martial Law* (1892), pp. 38–41. Dana's notes in his edition of Wheaton state that the occupying forces have 'a right to require of the inhabitants an oath or parole, not inconsistent with their general and ultimate allegiance to their own state' to remain quiet and submit to the occupant's authority (Wheaton, *Elements of International Law* (8th ed. by Dana, 1866), p. 436, note. Although Hannis Taylor believed that temporary or qualified allegiance is owed to the occupant, he adopted the view that there is no legal or moral impediment to insurrection by the inhabitants if they are willing to undergo the perils of such an enterprise (*A Treatise on International Public Law* (1901), pp. 585–92).

[7] Phillimore, *Commentaries upon International Law* (3rd ed., 1885), vol. iii, p. 869; Creasy, *First Platform of International Law* (1876), p. 512; Wheaton, op. cit. (3rd English ed. by Boyd, 1889), p. 469.

3. *A duty of obedience created by international law*

A third theory of the duty of the inhabitant to the occupant, which stands in roughly chronological succession to the view just described, is cast in terms of a duty of obedience imposed by the law of nations. Although this view of the relationship of persons involved in belligerent occupation would certainly not create any greater latitude to commit acts hostile to the occupant, the difference in terminology is nevertheless significant. It suggests forcefully that the relationship of the inhabitant to the occupant is quite different in nature from the relationship of a citizen to his own country, and correspondingly that acts inconsistent with the security of the occupant and offences against the integrity of the state must belong to two separate bodies of law. In practical terms, it indicates moreover that the inhabitant may not be called upon to do certain acts, such as performing military service or forced labour or furnishing information on hostile activities, which might properly be expected of one owing allegiance.

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[1] Art. 26, General Orders No. 100, War Department, Adjutant General's Office, 24 April 1863.

[2] *Das moderne Völkerrecht der civilisirten Staaten* (1868), § 551.

[3] Art. 37. The provision in the *projet* submitted to the Conference by the Russian Government had been that the occupied population could not be required to submit to a 'serment de sujétion perpetuelle' to the enemy (see Art. 49, *Projet*, in *Actes de la Conférence de Bruxelles* (1874)).

[4] Art. 47, 'Manuel des lois de la guerre', in *Annuaire de l'Institut de droit international*, 5 (1881–2), p. 167. In a penal code of war prepared by de Landa in 1878, the requiring of an oath (of apparently any nature) of the population of occupied territory rendered the occupant guilty of an *abus d'autorité* ('Droit pénal de la guerre. Projet de classification des crimes et délits contre les lois de la guerre', in *Revue de droit international et de législation comparée*, 10 (1878), p. 183).

[5] See *The Proceedings of the Hague Peace Conferences. The Conference of 1899* (ed. by Scott, 1920), pp. 63, 428, 487, 557.

[6] Art. 68. See also Art. 67, which provides in part that 'They [the courts of the occupant] shall take into consideration the fact that the accused is not a national of the Occupying Power.'

Those who adopt the view that a duty of obedience is created by international law assert that the rationale of this principle lies in the consideration that a duty of obedience and submission is owed in return for the protection the inhabitant receives. A number of continental writers find a jurisprudential basis for this duty in what is variously described by Guelle as *une espèce de quasi-contrat*, by Loening as a *communauté de droit*, and by Fiore and Calvo as *une sorte de contrat moral* between occupant and occupied.[1] If an inhabitant breaches this social contract, which concededly is the creation of necessity and not of choice, he is placed outside the protection of the law and may be treated at discretion, subject to the limitations imposed by morality and natural justice. It is obvious that this legal principle, which makes an 'outlaw' of someone who commits some trifling act of hostility against the occupant, is difficult to reconcile with patriotic sentiment. Calvo is forced to concede that although the inhabitant of the occupied area 'ought' to desist from resistance, the same inhabitant has the 'right' and 'an imperious duty' under his own law to take up arms against the occupant and to seek to recover his freedom.[2] This caveat represents in itself a withdrawal from the extreme position taken by several other international lawyers, who had asserted that continued resistance on the part of persons in occupied territory is not sanctioned by international law, should not be required by the occupied state, and is, in virtually all circumstances, 'immoral'.[3]

Other continental writers who do not speak in terms of a social contract nevertheless believe that a duty of obedience, reciprocal to the occupant's duty of protection and like it created by international law, is owed to the occupant.[4] In some British texts the duty is also recognized as being created by international law, but it often appears under a different name, such as a duty of quiescence, as Spaight puts it.[5] Several military manuals, including the German *Kriegsbrauch im Landkriege*,[6] the British *Manual of*

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[1] Guelle, *Précis des lois de la guerre sur terre* (1884), vol. i, p. 130; Loening, 'L'Administration du gouvernement-général de l'Alsace durant la guerre de 1870–1871', in *Revue de droit international et de législation comparée*, 5 (1873), p. 72; Fiore, *Trattato di diritto internazionale pubblico* (2nd ed., 1884), vol. iii, pp. 238–9, 245; Calvo, *Le Droit international théorique et pratique* (5th ed., 1896), vol. iv, pp. 216–18.

[2] Loc. cit.

[3] See, e.g., Loening, op. cit., pp. 76–7, in which the author especially praises the efficacy of collective punishments, and Rolin-Jaequemyns, loc. cit., pp. 319, 325.

[4] Pillet, *Les Lois actuelles de la guerre* (1898), pp. 200–1, 207–9; Rolin, *Le Droit moderne de la guerre* (1920), vol. i, p. 429; Fauchille, *Traité de droit international public* (1921), vol. ii, pp. 210–11; Nys, op. cit., vol. iii, p. 108; Mérignhac, *Traité de droit public international* (1912), vol. iii, p. 416; Von Liszt, *Le Droit international* (tr. by Gidel from 8th German ed. of 1913), pp. 326–7.

[5] Lafiti, *Effects of War on Property* (1909), p. 11; Spaight, *War Rights on Land* (1911), p. 323.

[6] (1902), p. 114.

Military Law,[1] and the United States *Rules of Land Warfare*[2] speak in more general terms of a duty of obedience. While the source of the duty is not made plain by these texts, a proper inference would appear to be that it is regarded as lying in international law. An 'oath of neutrality' was demanded of the inhabitants of occupied areas in South Africa during the Boer War,[3] and this practice has received some sanction in the texts of this country.[4] Whether the previous exaction of an oath from a person who commits a hostile or dangerous act serves any sound purpose other than compounding his offence when he violates his pledged word is highly questionable, and there seems an air of unreality about such devices after the passage of half a century. Professor Hyde is probably the only modern authority who sees any efficacy in this procedure, which he compares with giving a bond to keep the peace, the peace in this case being one imposed by international law and its breach accordingly constituting a violation of that law.[5]

For the most part, no distinction is made by these authorities between a duty to refrain from acts endangering the occupant or intended to interfere with his military operations and the individual's duty to comply with the existing municipal law of the occupied area and the measures adopted by the occupant in pursuance of his obligations under Article 43 of the Hague Regulations.[6] Bordwell is a noteworthy exception. Certain acts, he states, such as attacks on troops and what we now refer to as sabotage, are violations of international law and are punishable as such by the occupant. Obedience is similarly owed to the occupant 'acting as the territorial authority in carrying out the ordinary purposes of government, and not for his own belligerent purposes'. But if he acts in a third capacity, that is, in serving his own military interests alone, no obedience is owed to him.[7] These distinctions appear to be excessively subtle, and the first and third aspects of the occupant's function are virtually indistinguishable. Still, his formulation of the law does serve to indicate a useful distinction between measures taken by the occupant on his own behalf and those directed to the normal government of the occupied area without regard to the military advantage, other than the preservation of order, thereby accruing to him. The second category is outside the scope of this article, but it should be noted that its importance is lessening. To an increasing degree even such measures as rationing and price control in occupied areas are inspired by the military needs of the occupant, and deliberate violation of such legislation may be employed as a weapon of resistance against the occupant.[1]

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[1] (1929), Amendments No. 12 (1936), p. 72.

[2] Field Manual 27–10, War Department, 1 October 1940, para. 301, repeating the substance of Art. 26, General Orders No. 100 of 1863.

[3] Holland, *The Laws of War on Land* (1908), p. 53.

[4] Ibid.; Wheaton, op. cit. (5th English ed. by Phillipson, 1916), p. 531.

[5] *International Law. Chiefly as Interpreted and Applied by the United States* (2nd rev. ed., 1945), vol. iii, pp. 1898–9. See Wheaton, op. cit. (5th English ed. by Phillipson, 1916), p. 531, for a criticism of the practical utility of the oath.

[6] To 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety'.

[7] *The Law of War between Belligerents* (1908), pp. 299–302. Professor Oppenheim criticized Bordwell's theory concerning the occupant as 'territorial authority' on the basis that when the occupant acts in this capacity, the obedience of which he incidentally receives the benefit is actually directed to the inhabitants' own laws and to their displaced government ('The Legal Relations between an Occupying Power and the Inhabitants', in *Law Quarterly Review*, 33 (1917), p. 366).

4. *A duty of obedience imposed by municipal law*

A provision of the Belgian Law of 25 May 1910, which approved Convention No. IV of The Hague of 1907, provided that the Hague Conventions and Declarations were to have 'full and complete effect in Belgium'. The Belgian Court of Cassation found in this Law a basis for concluding that a legislative measure of the German occupation authorities dealing with arbitration in rent controversies, having been promulgated in pursuance of Article 43 of the Hague Regulations, drew its legal effect not from the fact that the occupant held legislative power in Belgium but solely because Belgian law directed that it be observed.[2] The decree referred to appears to be a consequence of the occupant's authority and responsibility to secure order in the occupied area rather than of his ability to prevent conduct dangerous to him. The legal principle enunciated in the opinion might accordingly not prove applicable to acts of resistance by inhabitants.

The Court of Cassation's view of the law has been sympathetically received by several Belgian commentators, but has gained little currency elsewhere.[3] Most national courts would, it is submitted, be hesitant to construe the incorporation of the Hague Regulations into municipal law as constituting advance assent to whatever legislative measures the occupant might impose in conformity with those Regulations. De Visscher justly observes that the sovereign is free to determine the attitude to be taken by the population of the occupied area toward the occupant and that the sovereign will require its submission to the decrees and proclamations of the occupant only for such time as this conformity appears to be in the national interest.[1]

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[1] It was so used in occupied Czechoslovakia during the Second World War (*Four Fighting Years* ('Published on Behalf of the Czechoslovak Ministry of Foreign Affairs (Department of Information)', 1943), p. 121). As the occupying Power, under Art. 55 of the Geneva Civilians Convention of 1949, has the 'duty of ensuring the food and medical supplies of the population', deliberate attempts to keep such articles from the market may constitute an additional drain on the resources of the occupant and may thus be used as a weapon of resistance.

[2] *Procureur Général Près la Cour d'Appel de Liége* v. *Marteaux, Michaux et Consorts et le Comte de Borchgrave d'Alténa* (1916), *Pasicrisie Belge*, 1915–16, vol. i, p. 375, *Belgique Judiciaire*, 1919, cols. 148 ff. But see *Cambier* v. *Lebrun et al.* (1919), *Annual Digest*, 1919–21, Case No. 325, p. 459, in which it was held that 'The decrees of the occupying Power, whatever they may be, do not emanate from the exercise of national sovereignty. They have not the validity of Belgian laws, but are merely commands of the enemy military authority and are not incorporated in the legislation or the institutions of the country.' The Belgian cases on the legislative function of the occupant are discussed in Van Nispen tot Sevenaer, op. cit., pp. 176–203.

[3] Rolin, op. cit., vol. i, pp. 445–7; de Visscher, 'L'Occupation de guerre', in *Law Quarterly Review*, 34 (1918), pp. 78–79.

5. *A duty of obedience based exclusively on the power of the occupant*

While the theory that international law imposes a duty of obedience on the inhabitant has received considerable support, it has by no means gained universal acceptance either in the last century or in this. There is a strong tendency in modern law, and, it is submitted, a correct one, to deny that there is any duty of obedience founded on any legal or moral obligation with which international law concerns itself. The occupying Power's ability to enforce respect for its legitimate interests is not a creation of the law. It springs instead from superior military power and from factual capacity to compel obedience. International law suffers the occupant to legislate, but it will not lend its authority or its assistance to the enforcement of such legislation.

Although the theory that international law creates an obligation of obedience seems to prevail in French law, and in continental law generally, there is, even among the protagonists of this view, a disquieting realization that the 'moral contract' or 'community of law' or 'the reciprocal rights and duties of the inhabitant' are created solely by force.[2] Those who attribute a frankly factual basis to such duty are comparatively few in number—Jacomet, Coll, and Lorriot among the French writers.[3] De Visscher similarly recognizes the *de facto* character of the occupant's authority but suggests that the peaceful conduct of the population permits the proper sovereign to claim protection for his people.[4] It is, however, no longer the proper sovereign alone who may claim this protection, as war crimes trials following the Second World War have made plain,[5] and it is also evident that protection may be claimed for the occupied population, at least in the form of certain judicial safeguards, notwithstanding violent individual and collective resistance.[6] In England there has been a more pronounced tendency to find the source of the inhabitant's obligations in the military power of the occupant. In the modern texts, such as those of Hall, Phillipson, Pitt Cobbett, Keith, McNair, and Oppenheim, the question is generally regarded in this realistic fashion.[1] But the principle that international law operates only on states, which seemed to at least one British publicist to be a sufficient explanation for this attitude,[2] has lost some of its persuasiveness since the First World War.

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[1] Loc. cit. And see Van Nispen tot Sevenaer, op. cit., pp. 148–9.

[2] See authorities cited on p. 240, n. 1, *supra*.

[3] Jacomet, *Les Lois de la guerre continentale* ('Publié sous la direction de la section historique de l'état-major de l'année', 1913), p. 69; Coll, *L'Occupation du temps de guerre* (1914), pp. 71–72; Lorriot, *De la nature de l'occupation de guerre* (1903), p. 175.

[4] Op. cit., p. 79.

[5] See in this connexion the Declaration of German Atrocities, 1 November 1943, issued following the Moscow Conference.

[6] See p. 255, n. 6, *infra*. The Geneva Civilians Convention of 1949 lends no sanction to the view that the safeguards it affords are contingent on the peaceful conduct of the population. A number of provisions, notably the prohibition on collective penalties and reprisals contained in Art. 33, indicate the contrary to be true.

It is difficult to believe that during the Second World War many of those who suffered under German, Italian, or Japanese occupation could have believed that their obedience to the occupation measures of those countries was demanded by any higher moral order or by international law itself, even when such measures were taken in conformity with law. The abstract question of the source of their duty, however, seldom demanded the attention of tribunals concerned with prosecutions for war crimes and collaboration. The relationship of occupant and occupied was more often approached from the standpoint of the propriety under international law of resistance by inhabitants of occupied countries. As this matter lends itself to consideration in connexion with the academic doctrine of war rebellion, comment thereon must be deferred until account has been taken of the historical development of the kindred principles of war treason and war rebellion. It may be observed that these terms are customarily regarded as being descriptive not only of violations of a duty of obedience imposed by international law but also, and more surprisingly, as being the titles ascribed by international law to certain breaches of a duty of obedience attributed exclusively to the military power of the occupant.

II. *War treason*

'War treason' has been variously described, but the majority of definitions agree that it involves the commission of hostile acts, except armed resistance and possibly espionage, by persons other than members of the armed forces properly identified as such. The concept is not peculiar to the law of belligerent occupation, for war treason, it is said, may be committed anywhere within the lines of a belligerent.[3] The term 'war treason' in the sense in which it is now understood in international law was first used in General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*, which was ostensibly prepared by a board of army officers in 1862 and 1863 but was actually the work of Dr. Francis Lieber, Professor of History and Political Science at Columbia College in New York. Article 90 of the *Instructions* provided:

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[1] Hall, *A Treatise on International Law* (4th ed., 1895), p. 498; Wheaton, op. cit. (5th English ed. by Phillipson, 1916), p. 520; Pitt Cobbett, *Cases on International Law* (5th ed. by Walker, 1937) vol. ii, p. 169; Wheaton, op. cit. (7th English ed. by Keith, 1944), vol. ii, p. 234; McNair, *Legal Effects of War* (3rd ed., 1948), p. 332, n. 2; Oppenheim, *International Law* (6th ed. by Lauterpacht, 1944), vol. ii, p. 343.

[2] See Oppenheim's use of this rationale in 'The Legal Relations between an Occupying Power and the Inhabitants' in *Law Quarterly Review*, 33 (1917), p. 367. Van Nispen tot Sevenaer takes a like view (op. cit., p. 204).

[3] See, e.g., the definitions in Oppenheim, *International Law* (6th ed. by Lauterpacht, 1944), vol. ii, p. 457; British *Manual of Military Law* (*1929*), Amendments No. 12 (1936), p. 37; United States *Rules of Land Warfare*, para. 205.

> 'A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.'

Successive articles dealt in detail with the offences constituting war treason, including the giving of information to the inhabitant's proper government, service as a guide to the enemy in a 'hostile and invaded district', the misleading of the enemy by guides, and all 'unauthorized or secret communication with the enemy'.[1] The offence could equally be committed by a civilian or by an enemy soldier in disguise who entered the occupied area,[2] but apparently could take place only in occupied or invaded territory.[3] If a successful war traitor returned to his own army and was subsequently taken prisoner, like a spy he could not be punished for his previous offence.[4] Although Lieber claimed that he had been the first to use the term 'war traitor',[5] there were precedents for the concept in the military law of at least three nations, with all of which Lieber may well have been familiar.

The history of *Kriegsverrat*, or war treason, may be traced back to medieval Germanic law, in which it constituted a violation of duties of fidelity toward the lord.[6] Professor Oppenheim suggested[7] that Dr. Lieber, who had seen service in the Prussian army several decades earlier, may have been familiar with the provisions relating to *Kriegsverrat* in the Prussian Military Penal Code of 1845, which contained a stipulation subjecting to extraordinary military jurisdiction '. . . all subjects of the Prussian state or aliens who have, in the theatre of war, caused any danger or prejudice to the Prussian troops, by acts of treason'.[8] Although it is by no means clear from the face of this provision that it applied to occupied areas as well as to territory normally subject to Prussian law, both the previous history and subsequent revisions of the Military Penal Code indicate that this was intended. A similar provision in Sections 67, 69, and 70 of the Prussian Penal Code of 1851 made all aliens guilty of an act of treason against the Prussian state or Prussian soldiers amenable to the law of war.[1] The French Code of Military Justice for the Army of 1857, which was an improbable source of inspiration to the ardently francophobe Lieber, contained a like stipulation, subjecting persons within enemy territory to court martial jurisdiction for the commission of certain offences, among which were espionage and treason.[2]

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[1] Arts. 92, 95, and 98. Art. 97, dealing with guides who mislead, does not specifically mention war treason, but the context of the article suggests that Lieber intended so to characterize such conduct.

[2] See Art. 99, regarding the soldier, not in uniform, who is captured while carrying messages in occupied territory, and Art. 104, which refers to the war traitor who has 'safely returned to his own army'.

[3] Lieber speaks of 'a place or district under martial law' (Art. 90), 'a country or place invaded or conquered' (Art. 92), an 'invaded or occupied territory' (Art. 98), and 'a hostile and invaded district' (Art. 95).

[4] Art. 104. This limitation appears only in the Code and was not adopted in subsequent texts and manuals (see *Rules of Land Warfare*, para. 213).

[5] MS. Notebook by Lieber, Office of the Judge Advocate General of the Army, Washington, D.C., U.S.A.

[6] Pella, 'La Répression des crimes contre la personnalité de l'état', in *Recueil des cours de l'Académie de droit international*, 33 (1930), pp. 690–1.

[7] 'On War Treason', in *Law Quarterly Review*, 33 (1917), p. 281.

[8] *Militärgesetz-Codex für das Preussische Heer*, 3 April 1845, Part 2, Title 1, § 18 (4).

A third possible source of the concept of war treason in Lieber's Code was American practice itself. Reference has previously been made to General Kearney's purported absolution of the inhabitants of occupied New Mexico from their allegiance to the Republic.[3] At that time, treatment as traitors was promised to those found in arms against the United States. When, in 1847, the leader of an uprising in New Mexico was sentenced to death for 'treason against the United States', the Secretary of War advised the local military commander that the offender could not be said to be guilty of that offence, as he owed the United States no allegiance.[4] In March 1863, during the period when General Orders No. 100 was being prepared, General Halleck wrote a letter to the Union commanding officer in Tennessee in which he used the expression 'military treason' as applicable to persons who took up arms against the occupying army or the authority established by it or who furnished information to the enemy without proper authority.[5] He specifically distinguished this species of treason from the normal domestic variety.

Several circumstances indicate that it was the American practice, and more particularly the views of General Halleck, which proved a decisive influence in Lieber's adoption of the term 'war treason'. Lieber had dealt with the law of war in his *Political Ethics*, in a series of lectures he had given at Columbia College in 1861 and 1862, and in a pamphlet on guerrillas which he had prepared at the instigation of Halleck in 1862, but none of these writings adverts to war treason.[6] Indeed, in the last of these, he had described as espionage acts which he was later to place in the category of war treason.[1] An early draft of General Orders No. 100 refers to treasonable acts committed by inhabitants of occupied territories without the use of the qualifying 'war'.[2] As this draft was submitted to Halleck for his comments, one may surmise that it was he who suggested a more cautious approach to the matter of hostile acts in occupied areas. The expression 'war treason' had the further advantage of being grammatically and logically symmetrical with the term 'war rebel', which Lieber had previously originated. Whatever may have been the influences working on Lieber, he was certainly aware that he was dealing with a species of treason cognizable by international rather than by municipal law. Although General Orders No. 100 was prepared in time of civil war and must undoubtedly have been coloured to a certain extent by the military situation then prevailing, Lieber intended that General Orders No. 100 should constitute a code of the international law of war, and he was assiduous to distinguish those principles applicable only in civil wars from those to be observed in wars between states.[3]

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[1] See Loening, op. cit., p. 79.

[2] Loening, op. cit., p. 78. See Dalloz, *Jurisprudence générale*, 1865, Part 1, p. 500; ibid., 1866, Part 1, p. 45, in connexion with the sanctioning of this practice by the French Court of Cassation.

[3] See p. 237, *supra*.

[4] Richardson, op. cit., vol. iv, p. 598.

[5] Quoted in Halleck, op. cit. (3rd English ed. by Baker, 1893), vol. ii, pp. 55–57. General Halleck had also written to the commanding general of the Confederate forces stating that, although the United States did not extort oaths of allegiance, it did reserve the right to punish persons within its lines who were suspected of giving aid and information to its enemies or performing any other 'treasonable act' (quoted in Wheaton, op. cit. (2nd ed. by Lawrence, 1863), p. 625, n. 190).

[6] *Political Ethics* (1838–9), pp. 629–68, 'Lectures on the Laws and Usages of War delivered at the Law School of Columbia College, 1861–62', MS., Johns Hopkins University Library, Baltimore, Md., U.S.A.; *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862).

The Supreme Court of the United States had several decades previously committed the jurisprudence of that country to the view that the inhabitant of an occupied area temporarily owes allegiance to the occupant. It was not unnatural therefore that the same obligations that rested on residents of the United States should be imposed on an individual who owed allegiance to the United States by reason of occupation, albeit the allegiance was only temporary, and that violations of the fidelity to which each was bound should be generally described in terms of treason. At the same time, the very characterization of war treason as something apart from treason under municipal law represented in itself a significant departure from what might be considered the logical consequences of the rule of temporary allegiance.[4] This deviation from the archaic rule then accepted by the courts should not, however, blind us to the real importance of the appearance of this new doctrine. For 'war treason' represented a fresh borrowing from domestic law at the very time that the law applicable to occupied areas was becoming a subject for international rather than municipal regulation and had successfully thrown off most of the shackles of the past.

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[1] Op. cit., p. 12.

[2] *A Code for the Government of Armies in the Field as Authorized by the Laws and Usages of War on Land*, 'Printed as manuscript for the Board appointed by the Secretary of War "To Propose Amendments or Changes in the Rules and Articles of War, and a Code of Regulations for the Government of Armies in the Field, as authorized by the Laws and Usages of War" ' (February 1863), Art. 54.

[3] Lieber later wrote: 'While writing down this code I felt the high responsibility weighing on me and the gravity as well as the nobleness of this task; I was conscious of doing a piece of work for mankind of historic effect and permanency' (MS. Notebook, *supra*). Sec. X of the Code comprises nine articles applicable to insurrection, civil war, and rebellion. These articles specify the extent to which the Code is applicable under such conditions.

[4] Lieber, in Art. 26, had said no more than that the inhabitant owes a duty of obedience.

Kriegsverrat reappeared in Germany, transformed from a concept of municipal law to one of international law, in Bluntschli's *Das moderne Kriegsrecht der civilisirten Staaten.*[1] Despite this entry of war treason into German law under a new guise, it is probable that the provisions of the German Military Penal Code of 1872 applicable to *Kriegsverrat* were the outgrowth of earlier legislation, rather than of any development in international law. The Code stipulated that war treason was punishable by forced labour 'for at least ten years or in perpetuity' and itemized some twelve offences to be considered as war treason. These included espionage, communication with the enemy, betrayal of fortresses, troops, supplies, and secrets to the enemy, and refusal to obey an order.[2] A modified version of Section 161 of the 1872 Military Penal Code, which was in effect during the Second World War, made acts by the inhabitants of occupied countries against the Reich punishable in the same manner as if they had been committed in Germany. Although this provision of law was invoked by the defence in the *Justice Trial*, the Tribunal, while condemning the indiscriminate characterization of wrongs against the occupying Power as 'high treason', did not find it necessary to determine whether Section 161 was in conformity with international law.[3]

For the international conference on the laws of war which was held in Brussels in 1874, the Russian Government had prepared a draft convention. The *projet* did not refer to war traitors, but communication of information to the enemy by inhabitants of occupied territory was treated under the general heading 'Of Spies'.[4] The draft article was, however, suppressed in conformity with the unanimous opinion of the committee which considered it,[5] and the resulting code contained no reference to war treason or to the duty of the inhabitant to the occupant, the latter being merely enjoined not to require an oath of allegiance.[6] When the Institute of International Law prepared a similar manual at its Oxford meeting in 1880, it contented itself with stating that 'individuals who commit acts of hostility against the occupying authority are punishable' and that if inhabitants do not submit to the orders of the occupying authority, they may be compelled to do so.[7] The proceedings of the Hague Conferences of 1899 and 1907 are devoid of any reference to war treason under that name, and there are only isolated references to the commission of hostile acts by the inhabitants of occupied territory.[8]

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[1] (1866), §§ 122, 127. See also *Das moderne Völkerrecht der civilisirten Staaten* (1868), §§ 631–9.

[2] *Militärstrafgesetzbuch*, 20 June 1872, §§ 57 and 58.

[3] *In re Altstötter et al.* (1947), *Law Reports of Trials of War Criminals* (hereinafter referred to as '*War Crimes Reports*'), vol. vi, pp. 53, 61.

[4] *Projet*, Art. 20.

[5] *Actes de la Conférence de Bruxelles (1874)*, p. 44.

[6] See p. 239, n. 3, *supra*.

[7] Arts. 47 and 48, 'Manuel des lois de la guerre', in *Annuaire de l'Institut de droit international*, 5 (1881–2), p. 167.

[8] See the statement of Colonel Gross von Schwarzoff concerning Arts. 44 through 47 of the

If war treason was received with indifference by those actively concerned in the codification of the law of war, it met a lively and far from uniform reception in text-books and monographs. Those who regard it as a useful and accurate category of international law do not greatly exceed those who do not, and it is difficult to segregate proponents and opponents on national lines. Both before and after the First World War, it was, for example, described as an accepted doctrine of international law by a number of continental international lawyers, who believed it to be applicable only to communication with the enemy.[1] On the other hand, it meets with little sympathy at the hands of Pillet and Jacomet, who feared that it was responsible for excessive individual and collective punishments and that it failed to take into account the duty of fidelity which the citizen still owes to his state.[2]

In the British view of international law, war treason embraces a wider range of offences than it does in continental law and includes most of the acts in occupied territory which give aid and comfort to the enemy, with the exception of rebellion and espionage.[3] Professor Oppenheim, more than any other individual, has been responsible for the respectability which war treason has attained in English law.[4] He included a discussion of the 'war crime' of war treason in the first edition of his text in 1906,[5] and the list of offences which he regarded as constituting war treason has, with the deletion of certain psychological warfare activities in occupied territory, remained unchanged to this day.[6] A rationale for the principle is seldom encountered, but Spaight suggests that treason no longer means infidelity to a personal sovereign and is now a proper description of any conspiracy against the established authority in a state. If the occupant becomes 'war ruler' of the occupied area, to conspire against him is as much treason as it is to conspire against the ruler in the accepted sense, since both constitute

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Hague Regulations that '. . . these limitations could not be deemed to check the liberty of action of belligerents in certain extreme circumstances which may be likened to a kind of legitimate defense' (Report to the Conference from the Second Commission on the Laws and Customs of War on Land (1899), in *Reports to the Hague Conferences of 1899 and 1907* (ed. by Scott, 1917), p. 149).

[1] Guelle, op. cit., vol. i, pp. 129–30; Mérignhac, op. cit., vol. iii, p. 290; Despagnet, *Cours de droit international public* (4th ed. by Boeck, 1910), p. 855; Fauchille, op. cit., vol. ii, p. 211; Calvo, op. cit., vol. iv, pp. 181–2. Rolin expresses only qualified approval and deplores the invoking of war treason as the basis for indiscriminate application of the death penalty (op. cit., vol. i, pp. 372–5).

[2] Pillet, op. cit., pp. 207–9; Jacomet, op. cit., p. 67. Some of the disquiet which the concept aroused may probably be attributed to anxiety about the use to which it was put by the German armed forces.

[3] See, e.g., Oppenheim, *International Law* (6th ed. by Lauterpacht, 1944), vol. ii, p. 457.

[4] See his *apologia* for war treason in 'On War Treason', in *Law Quarterly Review*, 33 (1917), pp. 266 ff., the writing of which was prompted by Professor Morgan's article, 'War Treason', in *Transactions of the Grotius Society*, 2 (1916), pp. 161 ff.

[5] *International Law* (1906), vol. ii, pp. 162, 268.

[6] Ibid. (6th ed. by Lauterpacht, 1944), vol. ii, p. 457.

the 'established authority' in the state.[1] But such eminent authorities as Holland and Westlake have been unable to reconcile the offence of war treason with the natural impulses of patriotism and the continuing bond of the citizen with his own state and his own government.[2]

War treason has been treated in military manuals since the *Instructions* promulgated by the United States in 1863, and some of Lieber's language is preserved in the current *Rules of Land Warfare* employed by the United States Army.[3] References to the subject are also to be found in the British *Manual of Military Law*[4] and the German *Kriegsbrauch im Landkriege*, published in 1902.[5] The British and American manuals, and Anglo-American law generally, regard war treason as an offence which may be committed not only in occupied territory but also within invaded areas and anywhere within the lines of a belligerent.

In the actual practice of states, however, resort to war treason as a juridical basis for the punishment of hostile acts has been comparatively rare. Persons who withheld arms from the German occupying forces during the Franco-Prussian War were held to be guilty of treason,[6] and in the Russo-Japanese War the Japanese characterized certain acts hostile to them, including espionage and the furnishing of information to the enemy, as 'treasonable'.[7] The peculiar nature of the occupation of the Philippine Islands by the United States following the war with Spain in 1898 occasioned some doubt whether native insurgents could be punished for treason. The matter was not resolved until November 1901, when the Philippine Commission passed an act defining and providing for the punishment of treason.[8] Persons in the Orange Free State who had signed a declaration of neutrality but had subsequently held communication with or aided the enemy were in 1900 considered to be guilty of 'treachery'.[9]

The classic case of war treason, which occurred during the First World War, is the trial of Nurse Edith Cavell for assisting in the escape of British and French soldiers and Belgians of military age from areas occupied by the German army. She was charged with violation of Section 58 of the German Military Penal Code, which defined the offence of 'guiding soldiers to the enemy' as military treason, punishable by death.[1] In spite of the popular excitement which the case aroused at the time, it is difficult to see how the German military forces could have been expected to take anything but the serious view of her acts which their dangerous character demanded. It is reported that the term 'war treason' was, like 'espionage' and 'franc-tireur', given a liberal interpretation by the German army during the First World War, and that it frequently served as an excuse for unwarrantedly severe individual and collective punishment of acts hostile to the German forces.[2]

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[1] *War Rights on Land* (1911), pp. 333–5.

[2] Holland, op. cit., p. 49; Westlake, *International Law*, Part ii (2nd ed., 1913), p. 100. See also Wheaton, op. cit. (5th English ed. by Phillipson, 1916), p. 528; Morgan, loc. cit.

[3] Paras. 207, 208, and 210 of Field Manual 27–10, 1 October 1940, incorporate the language of Arts. 92, 95, and 91 of General Orders No. 100. These and other paragraphs of the *Rules of Land Warfare* dealing with war treason form the basis of references to this subject in Hyde, op. cit., vol. iii, pp. 1865–6, and Hackworth, *Digest of International Law*, vol. vi (1943), pp. 308–9.

[4] (1929), Amendments No. 12 (1936), p. 37.

[5] Pp. 50–51. See Morgan, *The German War Book* (1915), pp. 121–2.

[6] Bordwell, op. cit., p. 303, citing Bray, *De l'occupation militaire en temps de guerre* (1894), pp. 184–8.

[7] Ariga, *La Guerre russo-japonaise au point de vue continental et le droit international* (1908), pp. 397–401.

[8] Thomas, op. cit., pp. 301–2.

[9] Spaight, op. cit., p. 335.

In the Second World War, occupation practices often so far exceeded the bounds of legally permissible conduct that it is difficult, if not impossible, to subject them to legal analysis. When legal principles were invoked by members of the Axis, their application was part of a concerted scheme of oppression, and the law itself was prostituted to the purposes of the occupation forces. The premature annexation of certain areas by the German Reich would thus become the occasion for the extension of all or a portion of the German Criminal Code to the area so incorporated. Among these provisions would, of course, be Sections 80 to 93*a*, which dealt with treason and like offences, such as damage to weapons and inducement to desertion.[3] An official Polish publication states that a number of individuals in the incorporated portion of Poland were sentenced by German Special Tribunals for *Kriegsverrat*, which it defined as 'a term which means all actions detrimental to the Army of Occupation'.[4] The United States Military Tribunal at Nuremberg recognized in its judgment in the *Justice Trial* the impropriety of applying the German municipal law of treason to offences, however slight, which had been committed by Polish nationals in aid of that portion of Poland illegally incorporated in the German Reich.[5] On the whole, however, even the German authorities appear to have made little use of the concept of war treason.[6]

References to war treason in proclamations and decrees relating to the conduct of the populace in occupied areas are nevertheless the exception, and the rare exception, rather than the rule. Not only in the two World Wars of this century but in all the major conflicts which have taken place since the first codification of the law of war, occupants have set forth in plain and unambiguous language those acts which they consider to be dangerous to them and deserving of punishment.[7] It is obviously in the interest of both the occupant and the occupied that language as straightforward as possible should define their relationship. Prohibition of the commission of war treason would be incomprehensible to the average layman. Even the occupation of Germany after the assumption of supreme authority in that country by the signatories to the Berlin Declaration has not served as a basis for the creation of a category of acts 'treasonable' to the occupants. On the contrary, United States Ordinance No. 1 of Military Government for Germany[1] lists specifically some forty acts which will be punished because of the danger they present to the occupant, but war treason is not among these. Some of the offences might be considered to come within the conventional description of war treason; others are certainly not included.

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[1] For a description of the case see Garner, *International Law and the World War* (1920), vol. ii, pp. 97–105.

[2] Ibid., p. 96.

[3] Lemkin, *Axis Rule in Occupied Europe* (1944), pp. 136, 347.

[4] Polish Ministry of Information, *The New German Order in Poland* (1942), p. 41.

[5] *In re Altstötter et al.* (1947), *War Crimes Reports*, vol. vi, p. 53.

[6] Paoli, 'Contribution à l'étude des crimes de guerre et des crimes contre l'humanité en droit pénal international', in *Revue générale de droit international public*, 49 (1941–5), p. 151.

[7] See, e.g., Proclamation of Viceroy Alexeieff, 3 February 1904 (*Foreign Relations of the United*

War crimes trials following the Second World War have added almost nothing of substance to the jurisprudence of war treason. The subject was mentioned in several proceedings in which the accused were charged with failure to afford proper judicial safeguards to persons who had committed sabotage or who had attacked Axis soldiers. In the prosecution of several Japanese on this score, the judge advocates informed the court that inhabitants could legally be punished with death for the commission of war crimes, among which was included war treason.[2] In the *Trial of Wilhelm List and others* for reprisal killings, the United States Military Tribunal at Nuremberg mentioned that hostages might be shot upon the recurrence of certain acts of war treason, notice of which had been given to the civilian population.[3] In the modern case law relating to belligerent occupation, the concept has fallen into disuse.

The activities of British secret agents who were sent into occupied France to assist the resistance movement would appear to fall within that definition of war treason which embraces the hostile activities in occupied territory of military personnel disguised as civilians. However, in the *Natzweiler Trial*,[4] in which several Germans were tried for the summary execution of four British women who had been sent into France as secret

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States, 1904, p. 127); German proclamation of 5 September 1914 in Belgium (Huberich and Nicol-Speyer, *German Legislation for the Occupied Territories of Belgium* (1915), p. 1); Japanese proclamations of 25 December 1941 and 10 March 1942 in Hong Kong (described in Ward, *Asia for the Asiatics? The Techniques of Japanese Occupation* (1945), pp. 47, 77); German proclamation to the occupied territory in Belgium, 10 May 1940 (Lemkin, op. cit., pp. 317–18); Proclamation No. 1, Allied Military Government of Occupied Territory [Italy], 25 April 1944.

[1] *Military Government Gazette, Germany, United States Zone*, Issue A, 1 June 1946, p. 57.

[2] *In re Ohashi et al.* (1946), *War Crimes Reports*, vol. vi, p. 27; *In re Kato* (1946), ibid., vol. v, p. 37, both of which cite Oppenheim, the British *Manual of Military Law*, and the corresponding Australian manual. See also *In re Sandrock et al.* (1945), ibid., vol. i, p. 43, in which the defence that a Dutch civilian killed without trial had been guilty of war treason was regarded as irrelevant by the judge advocate, who alluded to the necessity of a trial in any case.

[3] *In re List et al.* (*The Hostages Trial*) (1947–8), *War Crimes Reports*, vol. viii, p. 62.

[4] *In re Rohde et al.* (1946), *War Crimes Reports*, vol. v, p. 54; see also *The Natzweiler Trial* (ed. by Webb, 1949), p. 202.

agents, the judge advocate left open the question whether the agents should be considered as spies or not, since it was clear in any case that they should have been afforded a trial. It does not appear that war treason was mentioned either in this proceeding or in the prosecution of *Schonfeld and others* for the summary execution of several baled-out airmen who were taken in civilian clothes while under the protection of the Dutch resistance movement.[1] The contention of counsel for Von Falkenhorst[2] that commando operations constituted sabotage and 'war treason', justifying denial of quarter to the troops involved, was without basis in law and apparently carried no weight with the court.[3]

III. *War rebellion*

The history of 'war rebellion' has roughly paralleled that of war treason, but the concept itself has proved to be considerably less controversial. The writings of Francis Lieber similarly constitute a point of departure for the development of this doctrine. The draftsman of General Orders No. 100 claimed,[4] and his statement appears to be an accurate one, that he originated the term in his pamphlet on guerrilla parties.[5] He defined the war rebel as a 'renewer of war within an occupied territory', and it is in this sense that the term continues to be understood. It presumably refers to uprisings in arms by groups of persons as distinguished from individual acts of hostility and from such conduct as sabotage committed either by individuals or groups. The latter two categories would probably be referred to as war treason, although the reason for the distinction is obscure.

From Lieber's pamphlet, the concept of war rebellion found its way into his *Instructions*[6] and the writings of Bluntschli[7] and so into European jurisprudence. The necessity of taking harsh measures against armed resistance in occupied areas has seldom been questioned, and the principal source of controversy has been, as was noted in connexion with the general duty owed to the occupant, whether there is any *right* to rebel and whether war rebellion constitutes a violation of any moral or legal obligation. The question arose at the Brussels Conference of 1874 and proved to be insoluble. The preliminary draft which had been drawn up by Russia contained an article providing that individuals in an area where the power of the enemy was already established who rose in arms against him might be referred to justice and would not be considered as prisoners of war.[1] The proposed article was subjected to criticism by the delegates of several of the smaller countries represented at the Conference, notably the Netherlands, Belgium, and Switzerland, who contended that it would be improper to require a state, the territory of which might thereafter be occupied, to concede to the enemy in advance jurisdiction over citizens who were responding to the highest sentiments of patriotism and to a positive duty to defend their country.[2] They conceded that the occupant might be forced to take severe measures against those opposing his authority, but were unwilling to make a *levée en masse* in occupied territory the subject of a blanket prohibition in positive international law. Agreement between the major Powers and these small states having proved impossible, it was decided to omit the draft article[3] and to leave the matter to existing international law, which was at the time itself uncertain.[4] Opposition from several large states defeated a renewed attempt at the Hague Conference of 1899 to reach a modicum of agreement through an ambiguous statement that nothing in the convention was to be construed as precluding 'the population of an invaded country' from fulfilling its 'duty of offering by all lawful means the most energetic patriotic resistance to the invader.'[5]

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[1] *In re Schonfeld et al.* (1946), *War Crimes Reports*, vol. xi, p. 64.

[2] *In re Von Falkenhorst* (1946), ibid., p. 27.

[3] Two further cases, one in the First World War and the other in the Second, touch on the subject of war treason, but neither took place in occupied territory. The first of these concerned a German agent, Lody, who was tried and convicted by a British court martial on a charge of having committed war treason in Great Britain. It has been stated that he was so charged because espionage was not at the time a capital offence (Phillipson, *International Law and the Great War* (1915), pp. 213–17; Morgan, 'War Treason', in *Transactions of the Grotius Society*, 2 (1916), p. 169). One of the charges against the German saboteurs, whose case was reviewed by the United States Supreme Court in *Ex parte Quirin* (1942), 317 U.S. 1, was violation of the 81st Article of War, which defines the offence of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy. Paras. 205 and 206 of the *Rules of Land Warfare* express the belief that this article of war defines the offence of 'war treason'. Whether the military commission which tried Quirin and his fellow agents considered the charge in this light and whether the accused were found guilty thereof cannot be stated at the present date, as the proceedings of the military commission are not to be released until the World War of 1939–45 is officially declared terminated (*New York Times* newspaper, 9 August 1942, p. 1, col. 4).

[4] MS. Notebook, *supra*.

[5] *Guerrilla Parties Considered with Reference to the Laws and Usages of War* (1862), p. 13.

[6] Art. 85 provided that 'War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same.'

[7] *Das moderne Völkerrecht der civilisirten Staaten* (1868), § 643.

In the writings of the publicists, varying effects are attributed to revolution by occupied populations. To many it is a violation of international law, which is variously said to produce as its sanction the removal of the occupant's protection, the termination of the protection of the law of war, the offender's prosecution as a 'war criminal' for 'illegitimate hostilities in arms', or his punishment at the unfettered discretion of the occupant.[6] In the opposing camp are to be found authorities such as de Visscher, Calvo, Hannis Taylor, and Hall, who state that there is a 'right' to revolt and perhaps even a duty, of which international law must take account, imposed by the continuing allegiance of the citizen to his own state.[1] The conflicting views which are taken are, for the most part, the logical concomitants of the diverse theories which have been adopted concerning the general relationship of the occupied population to the occupant. The doctrine of war rebellion appears, however, to have gained a fairly firm footing in Anglo-American law, for it is referred to in the standard texts of both Great Britain and the United States[2] and is described in the military manuals of both countries.[3] It should be noted, however, that whereas war rebellion is recognized as a 'war crime' by Oppenheim, his treatise denies that the inhabitant owes any duty of obedience to the occupant under international law.[4]

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[1] *Projet*, Art. 46.

[2] *Actes de la Conférence de Bruxelles* (1874), pp. 158–65.

[3] *Actes*, p. 165.

[4] Graber, *The Development of the Law of Belligerent Occupation 1863–1914* (1949), p. 85.

[5] The provision was proposed by the British technical delegate and was withdrawn in the face of strenuous objection from Russia and Germany (*The Proceedings of the Hague Peace Conferences. The Conference of 1899* (ed. by Scott, 1920), pp. 550–5).

[6] Halleck suggests that the right of an occupied population to revolt rests on the same principle as the right of revolution against any government (op. cit., pp. 792–5). See also Bordwell, op. cit., p. 302; Nys, op. cit., vol. iii, p. 108; Fauchille, op. cit., vol. ii, pp. 210–11; Rolin-Jaequemyns, op. cit., pp. 667–8; *Kriegsbrauch im Landkriege* (1902), p. 50.

In modern warfare, the *levée en masse*, or a general uprising of the populace, has been supplanted by the more subtle tactics of the resistance movement and the underground, which, while generally enlisting the sympathies of a large proportion of the population, are actively conducted by a minority of that group. The occupant is less likely to be faced by open rebellion than he is by guerilla warfare, sabotage, individual armed attacks, and other more refined acts of defiance. Having lost its utility, the conventional concept of war rebellion has, like war treason, passed into desuetude both in the practice of belligerents and in the substantive law applied by war crimes tribunals.[5]

Axis occupation practices exhibited such a callous contempt for the limitations imposed by international law on the conduct of the belligerent occupant that during the last five years courts have been called upon in relatively few instances to consider the conformity of resistance activities with the law of nations. More often cases dealing with the punishment of acts hostile to the occupant were decided on the issue whether the occupation authorities ought to have afforded, and did afford, a fair trial to the accused before his execution.[6] It was sufficient in several other instances to decide that reprisals against resistance activities were excessive or had been taken prematurely.[1] As the result of the prohibition of reprisals and collective punishments and the detailed provisions concerning judicial proceedings in the courts of the occupant which have been incorporated in the recent Geneva Civilians Convention,[2] the pronouncements of war crimes tribunals on these matters have become of diminished practical importance. Nevertheless, those cases in which the propriety of resistance activities has been considered have almost universally reached the conclusion that such acts are not in violation of international law. In the *Trial of Hans Albin Rauter*, who had been a German police official in the Netherlands, the Dutch Special Court of Cassation went so far as to state that resistance is a 'permissible weapon' to use against the occupant.[3] A Norwegian court of appeals rejected the defence raised by German police officials for their conduct in Norway that the activities of the underground movement were acts of illegitimate warfare and therefore might be made the subject of reprisals, which in this case took the form of torture. In the opinion of the Court the underground movement did not constitute a violation of international law, although the activities of members of the movement were presumably violations of a body of local law enforced by the German authorities.[4] This issue was not discussed by the Supreme Court in affirming the decision of the court of first instance, but in the *Trial of Flesch* on similar charges, the Supreme Court affirmed the holding of the court of appeals that underground activities, even in the form of guerilla warfare, were not, in the circumstances, in violation of international law.[5] The military tribunal which tried Wilhelm List did not specifically discuss whether resistance is lawful under international law.[6] It did, however, state that persons guilty of acts of resistance to the occupation forces become 'war criminals *in the eyes of the enemy*'[7] and 'must accept the increased risks involved in this mode of fighting' because it is only in this fashion that the occupant may protect himself against what the Court called 'the gadfly tactics of armed resistance'. The Tribunal concluded that 'We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the laws of war.'[8] The language is more suggestive on the whole of a punishment *permitted* by international law than it is of a punishment *imposed* by international law.

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[1] De Visscher, loc. cit., pp. 76–77; Calvo, op. cit., vol. iv, p. 218; Taylor, op. cit., p. 592; Hall, op. cit., p. 498.

[2] Oppenheim, *International Law* (6th ed. by Lauterpacht, 1944), vol. ii, p. 456; Hyde, op. cit., vol. iii, p. 1794 (citing Lieber but not employing the term 'war rebellion').

[3] *Manual of Military Law* (*1929*), Amendments No. 12 (1936), p. 83, which characterizes war rebellion as 'illegitimate hostilities in arms'; United States *Rules of Land Warfare*, para. 349.

[4] Op. cit. (6th ed. by Lauterpacht, 1944), vol. ii, p. 343.

[5] For an isolated example of the use of the term see *In re Ohashi et al.* (1946), *War Crimes Reports*, vol. v, p. 25.

[6] *In re Von Leeb et al.* (*High Command Trial*) (1948), *War Crimes Reports*, vol. xii, p. 1; *In re Buck et al.* (1946), ibid., vol. v, p. 39; *In re Kato* (1946), ibid., vol. v, p. 37; *In re Yamashita* (1945–6), ibid., vol. iv, p. 1; and *In re Wagner et al.* (1946), ibid., vol. iii, p. 23, are typical examples.

The larger question of the obligation of inhabitants to obey the measures taken by the occupant for his security was considered by Dutch courts in connexion with the prosecution of collaborationists. Several contractors and police officials raised the defence that they had been legally obligated to obey what they contended to be the lawful commands of the German occupation authorities. The Dutch criminal courts and the Special Court of Cassation held, on the contrary, that the only effective defence to a charge of collaboration was one of *force majeure* and that the mere fact that the Hague Regulations sanctioned the requisitioning of services and the enactment of legislation designed to assure order and protect the occupant created no compulsion for individuals to render services in conformity therewith. The Hague Regulations were not intended to create rights against the population of an occupied territory; they merely limit the *de facto* authority of the occupant. Accordingly, they do not create legal obligations in conscience binding upon the inhabitants.[1]

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[1] *In re Von Mackensen and Maelzer* (1945), *War Crimes Reports*, vol. viii, p. 1; *In re Flesch* (1946–8), ibid., vol. vi, p. 111.

[2] Arts. 33, 64–78.

[3] *In re Rauter* (1948), *War Crimes Reports*, vol. xiv, pp. 127–9.

[4] *In re Bruns et al.* (1946), *War Crimes Reports*, vol. iii, p. 17.

[5] *In re Flesch* (1946–8), *War Crimes Reports*, vol. vi, pp. 115, 119.

[6] *In re List et al.* (*Hostages Trial*) (1948), *War Crimes Reports*, vol. viii, p. 34.

[7] Emphasis supplied.

[8] *War Crimes Reports*, vol. viii, p. 58.

The Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 has removed any lingering doubts about the status of certain organized resistance forces by providing that members of 'volunteer corps', including 'organized resistance movements' operating even in occupied territory, are entitled to be treated as prisoners of war upon capture, if they are commanded by a responsible person, have a fixed distinctive sign, carry arms openly, and conduct their operations in conformity with the laws of war.[2] This provision has been rendered necessary by war-time difficulties in securing recognition as prisoners of war for partisans who had conducted their activities in conformity with international law.[3] Underground movements carrying on clandestine activities and persons who individually make armed attacks on occupying military forces are presumably left to the common law of war, subject to the protection afforded by the Geneva Civilians Convention. For the activities of such persons, the appellation of 'war rebellion' hardly seems appropriate.

IV. *The validity of the traditional concepts*

The presence in international law of a theory which envisages a duty of obedience imposed by that law and characterizes certain acts hostile to the occupant as war treason or as war rebellion can only be explained in terms of history. It is particularly significant that these kindred concepts date from a period which was still one of transition from the rigorous law of conquest to the modern and more enlightened view of belligerent occupation. That they have persisted is the consequence of inertia in the law, which has failed to take account of later developments in warfare and in the law of occupation itself. One need only point out as illustrative of the antiquated state of the law the fact that certain paragraphs about war treason in the United States *Rules of Land Warfare* have remained unchanged over a period of nearly ninety years.[1] It must be observed, moreover, that these concepts have never during their history met wholehearted acceptance as positive international law; their present position is more than precarious.

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[1] *In re Contractor Worp* (1946), *Na-oorlogse Rechtspraak, Tribunalen in Nederland*, 2nd Year, 1946, No. 519; *In re Van Huis* (1946), ibid., 2nd Year, 1946, No. 605; *In re Heinemann* (1946), ibid., 3rd Year, 1947, No. 763. In *In re Van Huis*, the Special Criminal Court of The Hague, in a distinction reminiscent of Bordwell, conceded that measures designed exclusively for the benefit of the occupied country might create legal obligations for individuals.

[2] Art. 4 A (2). This principle had already been anticipated in previous writings, which had specified that members of a *levée en masse* in occupied territory who were taken prisoner by the enemy were not thereby deprived of all legal protection (Westlake, op. cit., Part ii, p. 100; Grob, *The Relativity of War and Peace* (1949), p. 268).

[3] *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims*, International Committee of the Red Cross (1947), pp. 107–10.

The essential issue which must be faced in a re-examination of this area of the law is whether a duty of obedience is imposed by international law or is merely a consequence of the armed might of the occupant, who alone creates the duty. There is no doubt that theories of allegiance and temporary allegiance are no longer tenable and belong to the past. As for a duty of obedience imposed by municipal law, it would appear that it lies within the competence of a state to impose such a duty if it believes this course to be desirable. Although it may be determined as a matter of policy that non-resistance or outright collaboration will best serve the national interests of the occupied state, it is improbable that such considerations will carry much persuasion.

In modern war resistance to the occupant is virtually inevitable if hostilities are still in progress. The civilian has not only been drawn into the maelstrom of war; he has voluntarily interjected himself into it. It seems to be a natural phenomenon in modern political societies that the citizen should feel a greater measure of responsibility for the support of his country and its political institutions than was true in an age when wars were fought by professional armies in the interests of absolute monarchs. We must also recognize that in the eyes of a citizen's fellows and in those of the world—indeed, probably in those of the enemy as well—there is no moral taint attached to an act of resistance by a civilian patriot.[2] If international law is to have a moral content, it is difficult to see how an ethical basis can be found for the principle that international law intervenes to quell acts of resistance which, in the moral sense of the world, are regarded as heroic rather than criminal.

The aggressor of today appears to have an initial advantage over defending forces, and an immediate, extensive occupation by the state first to move will in all probability befall the invaded country until defending military forces can be mobilized to drive out the enemy. At the same time that the occupant must continue to have the means of penalizing acts hostile to him or dangerous to his security, the emphasis of modern international law must nevertheless be on the protection of *all* the inhabitants of occupied territory, including those whose conduct is prejudicial to the occupant, against unwarranted severity in the occupant's rule. Yet the theory that international law imposes a duty of obedience serves the interests of the occupant, rather than those of the inhabitant, and may either inflame his passions or offer a rationalization for excessively harsh treatment of those under his protection. The emotional overtones of a belief that some higher legal order forbids and penalizes acts of resistance must inevitably lead to unmerited rigorousness in dealing with such conduct. Although collective punishments and reprisals and the taking and killing of hostages have been forbidden by the new Geneva Civilians Convention and certain maximum limitations have been placed on punishments,[1] there is still room for making penalties more onerous than they should be.

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[1] See p. 250, n. 3, *supra*.

[2] Although Oppenheim asserts that the inhabitant's duty of obedience is grounded in the martial law of the occupant rather than in international law, he indicates that making use of treason and espionage, while not illegal, is 'detestable and immoral' ('On War Treason', in *Law Quarterly Review*, 33 (1917), p. 268). This attitude does not appear to be in conformity with modern views of morality in warfare.

The contract theory which is often adduced as the reason for invoking international law in the suppression of acts of resistance is at best a fiction designed to explain away an unpalatable situation. It is unacceptable on three grounds. It is highly improbable, in the first place, that states or their individual citizens would ever concede that they enter into contractual relationships with the occupant by force of law. Secondly, the 'moral contract' lacks a moral foundation, for not only have the inhabitant and his government never consented to it but the populace has not been benefited by the substitution of the occupant's uncertain protection for that of its own government. Thirdly, it is difficult to depict as quasi-contractual a relationship in which the amelioration of the occupant's rule is not brought about by the peaceful conduct of the occupied population but is the subject of a positive prescription of international law. If acts of resistance were to dissolve the moral contract, which appears to be the logical outcome of this theory, the perpetrators of the hostile acts, and indeed the whole community, would appear to be placed outside the law and subject to whatever punishments the enemy might choose to impose. This conclusion is inconsistent with the view, judicially affirmed, that the protection of international law continues even though hostile acts may be committed against the occupant[2] and with the reaffirmation of this principle in the Geneva Civilians Convention of 1949.[3]

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[1] Arts. 33 and 68.

[2] *In re Rauter* (1948), *War Crimes Reports*, vol. xiv, p. 129, concerning which see p. 256, *supra*.

[3] See particularly Art. 33.

The argument that if international law imposes duties on the occupant, it must likewise confer rights on him and create duties for the inhabitants has a certain superficial attractiveness because it suggests symmetry and order in the law. However, such reciprocity of duty is demanded neither by logic nor by law. The position of aliens after reception affords a familiar instance in which the special protection granted by international law does not create in *international* law a corresponding duty upon the part of aliens to respect the laws of the state whose hospitality they enjoy. There is also a peculiar inconsistency between the fact of international law defining the relationship of the individual to the authority placed over him by force of arms and the role assigned to municipal law of defining the inhabitant's obligations to the state of which he is a citizen. The reciprocity principle is, moreover, unsatisfactory from a practical point of view because it disregards the function of the international law of war—the amelioration of the conditions of warfare to the maximum extent compatible with the conduct of hostilities, rather than the provision of a set of rules more appropriate to a parlour game than to the lessening of human suffering.[1] Experience has shown that the attempt to place the source of the duty in the law of nations has probably done more to prejudice the cause of occupied peoples than it has to mitigate the severities of war for the non-combatant. Indeed, if a duty of obedience is imposed by the law of nations, it leads to the inference that the latter lends its active support to the conduct of hostilities and that it is itself a weapon of war in so far as it supplies a means of keeping occupied populations in subjection. There is thus room for the view that international law can only be debased by placing obligations on individuals in this area of the law.

If a person committing acts of resistance is guilty of a violation of international law, it seems strange that the individual's own government may inspire or demand such acts without being subjected to similar penalties. Yet it has never been suggested that a state is guilty of an international delinquency if it calls for acts of resistance or avails itself of the fruit of the forbidden tree.[2] Nor has it been suggested by those who allege that international law creates obligations for persons in occupied territory that the state whose citizens these are has a duty to suppress the patriotic sentiments of those of its people who are under alien military control or to punish its citizens who resist the occupying forces. The resulting proposition that international law imposes the duty of obedience only when an individual is being tried by the occupant for some hostile act is obviously untenable.

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[1] Such expressions as 'the rules of warfare' and 'the laws and customs of war' have not contributed to efforts to enhance the respect in which the international law of war is held.

[2] Oppenheim, 'On War Treason', in *Law Quarterly Review*, 33 (1917), pp. 268 ff. Art. 24 of the Hague Regulations, which provides that 'the employment of measures necessary for obtaining information about the enemy and the country are considered permissible', indicates that a belligerent may avail himself of the services of the inhabitants of occupied areas for intelligence purposes.

The Geneva Civilians Convention affords no basis for the assertion that international law constrains the inhabitant to obedience. Both Articles 27 and 64, which authorize the occupying Power to take 'such measures of control and security . . . as may be necessary' and to subject the population to 'provisions . . . essential . . . to the security of the Occupying Power', are cast in permissive terms. These articles and the requirement of Article 65 that offences punishable under the martial law of the occupant must be announced before individuals may be punished for their commission, indicate in strong terms that, subject to the limitations of the Convention, international law permits the occupant to define the incidents of the inhabitant's duty of obedience and submission.

From whatever perspective the inhabitant's duty to refrain from acts inconsistent with the security of the occupant is examined, the argument that such duty is grounded in international law proves unacceptable. It is not in conformity with the practice of states, it creates difficulties of a practical nature, it is inconsistent with morality and with the fundamental principles of the law of war, and it cannot be reconciled with the most recent expression of the desire of the world to better the lot of the civilian in wartime. The source of the inhabitant's duty of obedience can only be the power of the occupant to demand it. The law must take as its starting-point the fact of military supremacy and then set forth to place limits of reasonableness on the occupant's factual capacity to control those who live within the area he holds.

Notwithstanding Oppenheim's ability to reconcile war treason and war rebellion with his denial that there is any duty of obedience created by the law of nations, the three concepts normally march together. To the extent that these 'crimes' are regarded as violations of such a duty, they are open to the objections to that theory which have just been enumerated. They are unsatisfactory, moreover, on the further grounds that they tend to mislead and corrupt practice and that they today serve no useful purpose in systematizing and clarifying the law.

The very terms 'war treason' and 'war rebellion' carry over from municipal law certain connotations which have no rightful place in the law of nations. The most obvious of these is the normal revulsion occasioned by the conduct of the individual who betrays or takes up arms against the community which gives him its protection. The adoption of these concepts into international law has consequently meant that many hostile acts and acts inconsistent with the security of the occupant have been treated with a cruelty and harshness which they little deserved. If it be asserted that this objection goes only to certain popular misunderstandings of these terms in their application to the law of war, it may properly be replied that a legal concept which in fact serves no practical purpose and has that capacity to mislead which history has made plain, should have no place in the law. In a period in which 'war crimes' have acquired a heinous connotation of their own, it is particularly unfortunate that war treason and war rebellion should form one category with war crimes in their popular sense. Although it is generally recognized that war crimes in the form of acts of resistance are fundamentally different from those offences which have recently attracted public attention,[1] some states will probably be only too willing to characterize any acts committed against them as criminal in an international sense.

The meanings of the two terms are themselves obscure. Continental writers state, for example, that war treason applies only to communication with an inhabitant's own government, while the Anglo-American view seems to be that it applies to a wide range of acts hostile to the occupant, but not necessarily to all such acts. When war treason does consist in the communication of information to the inhabitant's own government, it is often quite difficult to distinguish it from espionage.[2] To suggest that espionage applies only to the communication of information acquired by illicit means does not resolve the difficulty, because it is frequently impossible and legally pointless to determine how the guilty information was acquired. It seems paradoxical as well to afford immunity to the spy who has gathered his information and then returned to his own army but to deny that immunity to him who obtains his information innocently and is subsequently able to return to his own military forces. The fact that espionage is regarded, almost without exception, as not being prohibited by international law,[3] makes it the more peculiar that such a close relation as war treason should ever have been regarded as falling under that law's positive prohibition.

The doctrine of war rebellion raises kindred problems of definition. Is it war treason if three civilians, members of an underground movement, dynamite an enemy barracks and kill soldiers sleeping there, and war rebellion only if the same three were to fire upon enemy soldiers? How many people does it take to make armed resistance war rebellion rather than war treason or some other nameless offence? Whatever the answers to these questions may be, war rebellion, which evokes images of a mass uprising of the peasants, is an inexact and misleading name for guerrilla warfare, the underground movement, the Fifth Column, the Resistance, and the Maquis. At the time of the promulgation of Lieber's Code nearly a century ago, the means whereby inhabitants could resist the enemy and favour their own government were necessarily limited, and war treason, war rebellion, and espionage may well have exhausted the list of ways in which a civilian living under military rule could aid his own government. In the intervening years, war has assumed a complexity that Lieber could not have envisaged, and as the weapons of warfare have been improved, so also have the weapons of resistance. A great variety of methods of doing injury to the occupant have been added to war treason, war rebellion, and espionage, conceived even in their most inclusive sense.[1] The occupant must have the means not only of penalizing acts which do him actual harm but also of punishing conduct that is potentially dangerous or offers conditions under which harm might be done.[2] He must have the means of dealing with such acts whether they are intended to injure him or are done without that *animus*. A violation of black-out regulations or restrictions on entering prohibited areas or failure to observe curfew have potentialities of interfering with the security of the occupant, and it should hardly be necessary that he have the burden either of proving that they were committed with the intention of harming him or that actual harm was caused him, except in so far as these determinations are made necessary by the restrictions on punishments embodied in Article 68 of the Geneva Civilians Convention.[3] The intent of the actor and the effect on the occupant may be significant, but they should not place artificial restrictions on the exercise of military jurisdiction.[4] A determination whether a given act is war treason or merely a violation of the ordinances of the occupant is thus absolutely useless, because the occupant has the means and the authority to punish it under either guise.

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[1] It was stated by the Tribunal in *Re List et al.* (1948), *War Crimes Reports*, vol. viii, at p. 54, that 'Some war crimes, such as spying, are not common law crimes at all; they being pure war crimes punishable as such during the war and, in this particular case, only if the offender is captured before he rejoins his army.'

[2] See Cohen, 'Espionage and Immunity—Some Recent Problems and Developments', in this *Year Book*, 25 (1948), p. 404.

[3] Oppenheim, *International Law* (6th ed. by Lauterpacht, 1944), vol. ii, p. 329; British *Manual of Military Law (1929)*, Amendments No. 12 (1936), p. 36; United States *Rules of Land Warfare*, para. 203. But see Hyde, op. cit., vol. iii, p. 1865, and 'Aspects of the Saboteur Cases', in *American Journal of International Law*, 37 (1943), p. 88.

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[1] De Watteville, 'The Military Administration of Occupied Territory in Time of War', in *Transactions of the Grotius Society*, 7 (1921), pp. 135, 138.

[2] See Campbell, 'Some Legal Problems arising out of the Establishment of the Allied Military Courts in Italy', in *International Law Quarterly*, 1 (1947), pp. 192 ff., for an account of the situation faced in territory subject to military occupation.

[3] Which makes intent and effect significant for the purpose of determining the maximum punishments which may be imposed.

[4] Both a literal reading of Art. 68 of the Geneva Civilians Convention and the history of its drafting lead to the inference that offences not 'solely intended to harm the Occupying Power' but nevertheless inconsistent with the occupant's security (e.g., stealing from military stores, counterfeiting of occupation currency, violation of curfew, attempted departure from occupied territory) are not punishable by imprisonment. Although the draft of this article, which was prepared at Stockholm, was liberalized by the addition of imprisonment to internment as the penalty for certain acts, the Report of Committee III to the Plenary Assembly at Geneva states specifically that the category of offences concerned has been restricted to 'those intended *solely* to harm the Occupying Power' (CDG/PLEN 71 Civ, 27 July 1949, p. 47; see also Art. 59, Working Document, Draft Convention for the Protection of Civilian Persons in Time of War (Doc. No. 4)). If restrictions of this nature are placed about the imposition of imprisonment as punishment, it may be anticipated that difficulties of a practical nature may be encountered in the preservation of the occupant's security, unless fines and other penalties not referred to prove adequate deterrents.

Leaving to the occupant the function of defining acts inconsistent with his security ultimately redounds both to his advantage and to that of the civilian inhabitant. The occupying Power must, on the one hand, be accorded wide legislative power to specify such acts without being fettered with the outmoded and academic concepts of war treason and war rebellion. The inhabitant, for his part, should welcome a precise definition of those acts from which he is expected to refrain. It should hardly be necessary to add that the ordinances of the occupant must not exceed the bounds of reasonableness in providing for his security and that measures intended to intimidate and oppress occupied populations without regard to the actual military requirements of the occupant are *ultra vires* and may subject their authors to criminal penalties under the international law of war. It is of particular significance that the concepts of war treason and war rebellion are not to be found in the new Geneva Civilians Convention of 1949. The acts of inhabitants which imperil the security of the occupant are described as 'espionage' or 'sabotage' or 'activity hostile to the security of the Occupying Power', but never by the old names.[1] In refusing to use the language of the text-books, the Geneva Conference appears to have adhered to the actual practice of states.

In the case of collective resistance, guerilla warfare, or sabotage, it may become necessary, of course, for the occupant to use a reasonable amount of force in repelling or subduing the attackers or in preventing their escape. By analogy with municipal law, the occupying forces should be legally privileged to wound or kill those individuals who resist arrest. But if the wrongdoers are once taken prisoner, it would appear that the trial and judicial process recognized by the common law of war and by the new Geneva Convention must be accorded them.

If war treason is not regarded as a proper concept of modern international law concerning occupied areas, there remains the problem of acts of this nature committed within or behind the lines of a belligerent but not in occupied territory. If such acts are committed on the territory of a belligerent, they obviously may be dealt with under the municipal law of the state against whom the hostile acts are taken. In areas subject to military jurisdiction, including the combat zone itself, civilians who abuse their immunity by assisting in battle and military secret agents in disguise may, as circumstances dictate, be characterized as spies or placed in the residual category of 'unlawful belligerents'.[1] Sabotage and demolition, communications, psychological warfare and intelligence activities, and even certain types of assistance in the form of voluntary labour for the enemy, have as much a military character as actual fighting, whether they are done by civilian volunteers or by disguised members of the enemy army, and are subject to like penalties. It would appear that acts of this nature committed in invaded areas or in the battle zone are not themselves prohibited by international law but merely preclude persons from claiming the immunity afforded by military status and conformity with the law of war.

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[1] Arts. 5 and 68. The limitations on capital punishment which Art. 68 imposes appear to pay excessive deference to the civilian engaged in hostile conduct (see Gutteridge, 'The Geneva Conventions of 1949', in this *Year Book*, 26 (1949), p. 324, n. 1).

The status of the enemy secret agent, military or civilian, who is sent into the occupied area appears to have been modified to some degree by the new Conventions. Under the customary law of war, it would appear that he had a right to a prompt trial before a prompt execution.[2] By assuming disguise he forfeited his entitlement to be treated as a prisoner of war and voluntarily threw in his lot with civilians who similarly lacked the immunity conferred by passivity or by membership in the armed forces. Article 5 of the Geneva Civilians Convention, the second paragraph of which refers to the activities of spies, saboteurs, and like persons in occupied areas, was inserted in the draft convention presented to the Geneva Conference in response to the fears of many delegations that the Convention might afford undue protection to secret agents.[3] The relevant portion of the article provides that spies, saboteurs, and persons who are detained under definite suspicion of activity hostile to the security of the occupant lose the right of communication if military security so requires.[4] In the words of the committee which considered the article, such persons are placed in 'solitary confinement'. If the cited provision of the Convention is intended to apply to secret agents who pass through the lines of a belligerent into the territory he occupies, it would appear to indicate that all such persons are now, except in so far as they are deprived of the right of communication, assimilated to the inhabitants of occupied territories. If this is true, then presumably spies benefit from the provision that the death penalty may not be imposed on inhabitants in areas where that penalty was not in force when the occupation began.[5] The spy and the secret agent may, in short, have attained a protected status under international law. However, the question of the status of such individuals under the new Conventions presents major problems which fall outside the confines of the present article.

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[1] *Ex parte Quirin et al.* (1942), 317 U.S. 1.

[2] See p. 252, n. 4, *supra*.

[3] Report of Committee III to the Plenary Assembly (CDG/PLEN. 71 Civ, 27 July 1949), pp. 6–7.

[4] 'Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.' Persons protected by the Civilians Convention are defined in Art. 4 as being all persons in the hands of a party to the conflict or an occupying power of which they are not nationals with the exception of those persons who are entitled to claim the protection of the other Geneva Conventions of 1949.

[5] Art. 68.

V. *Conclusions*

The adoption of the new Geneva Conventions and the general revision of text-books and military manuals which this change in the law has made necessary constitute a suitable occasion for an abandonment of the principles of a duty of obedience imposed by international law, of war treason, and of war rebellion. The practice of states, recent judicial decisions, and the provisions of the new Geneva Conventions provide evidence that these concepts serve neither the interests of occupying Powers nor of occupied populations. In the light of that evidence, the following would appear to be a desirable formulation of the law:

1. Subject to the general limitation of reasonableness and the specific limitations imposed by the Hague Regulations and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, international law permits a belligerent occupant to prohibit and punish, but does not itself prohibit, conduct by the inhabitants of occupied areas which is hostile to him or which is inconsistent with the security of his forces or administration.
2. In conformity with the Geneva Civilians Convention, the occupant must announce in advance those acts which he will penalize. The occupying Power must be recognized to have a wide range of legislative competence to forbid acts which may reasonably be considered to imperil his safety.
3. Like the spy, the individual who commits hostile acts or acts inconsistent with the security of the occupant may not be penalized for such acts after he has joined or rejoined the armed forces of his own state.

Admittedly, the civilian non-combatant is increasingly exposed to the economic and social burdens of war.[1] It is true also that the distinction between combatant and non-combatant grows more difficult to draw as new weapons of mass destruction are developed.[2] The practical difficulties with which the law of war is faced in these areas make it the more imperative that his lot under belligerent occupation, which is particularly appropriate to legal regulation, be made the subject of a body of law which takes account of the present-day needs of the civilian population without doing violence to the legitimate requirements of the occupant. It is in such measures as this that convincing proof may be given that the international law of war has continuing utility and validity.

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[1] Gutteridge, op. cit., p. 319.

[2] See Nurick, 'The Distinction between Combatant and Noncombatant in the Law of War', in *American Journal of International Law*, 39 (1945), p. 680.

THE EFFECT OF CHANGE OF SOVEREIGNTY UPON MUNICIPAL LAW

By SHABTAI ROSENNE, LL.B.

I

STATE succession as traditionally understood has been primarily concerned with the consequences of a change of sovereignty as the result of a cession. The question whether state succession is relevant to the attainment of independence—to what in this article is referred to as emancipation—depends mainly upon whether the new independent state possessed, while it was yet a dependent territory, any degree of known and identifiable *international* personality. If it had, then the acquisition of independence is, from a purely legal point of view, virtually indistinguishable from the process of a change of government, which leaves unaffected the international personality. But where the process of emancipation results in the creation of a new international personality in the whole or part of the previously dependent territory and in circumstances involving what Sir Arnold McNair has termed 'a break in the chain of legal continuity'[1]—such as when it is accompanied by some form of partition—there is not always room for the application of *customary* international law concerning state succession. Of this the instances of Pakistan,[2] Indonesia,[3]

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[1] 'Aspects of State Sovereignty', in this *Year Book*, 26 (1949), pp. 6–47, at p. 8, giving a legal meaning to the word 'revolution'. This can be compared with the conclusion of the Commission of Jurists concerned with the *Åaland Islands* dispute, that the formation of the independent state of Finland in 1917 and 1918 must be considered, at any rate in several aspects, as a 'new political phenomenon and not as a mere continuation of a previously existing political entity' (League of Nations, *Official Journal*, October 1920, Special Supplement No. 3, at p. 9.)

[2] See, for example, the discussions in the First and Sixth Committees during the Second Session of the General Assembly (United Nations, *Official Records of the General Assembly*, First Committee, pp. 3 ff., Sixth Committee, pp. 37 ff.). Cf. also the attitude adopted by the Registrar of the International Court of Justice in connexion with a notification to Pakistan, under Art. 63 of the Statute of the Court, of the institution of proceedings under the Convention of Montreux of 8 May 1937 to which India was a party: *Franco-Egyptian Case concerning the Protection of French Nationals and Protected Persons in Egypt* (*Pleadings*, &c., 1950, p. 16). In the case of Pakistan positive arrangements were made applying many of the notions of state succession.

[3] See United Nations, *Official Records of the Security Council*, Fourth Year, Special Supplement No. 6, Special Report of the U.N. Commission for Indonesia on the Round Table Conference held at The Hague from 23 August to 2 November 1949. The Charter of the Transfer of Sovereignty provided, in Art. 1: 'The Kingdom of the Netherlands unconditionally and irrevocably transfers complete sovereignty over Indonesia to the Republic of the United States of Indonesia and thereby recognises the said Republic of the United States of Indonesia as an independent and sovereign State.' Previously a limited degree of recognition had been contained in the so-called Linggadjati Agreement of 25 March 1947, and, after the Indonesian Question had been referred to the Security Council, in the so-called Renville Agreements of 17 and 19 January 1948 (S/649, S/650). It is debatable how far this limited recognition involved the creation of a new international personality: at all events the Constitution of the Republic of the United States of Indonesia, upon which the Transfer of Sovereignty itself rested, contained the

Trieste,[1] Israel,[2] and Korea[3] provide instructive illustrations. That does not mean, however, that the law of state succession is irrelevant for the purpose.

In the majority of cases of change of sovereignty which have occurred in recent times, whether brought about by cession or by emancipation, the new sovereign himself has taken steps to clarify the municipal law to be applied in his new territories. This, in itself, is evidence for the view that a change of sovereignty is accompanied by a break in the chain of legal continuity. Usually this clarification has been achieved by means of a legislative instrument of municipal law, either as a transitory provision in the Constitution or provisional Constitution of the new state where a document such as this comes into force simultaneously with the emergence of the new entity; or as a law enacted under whatever legislative device the provisional Government adopts to permit the issue of acts of a law-making nature, pending the creation of a more durable framework.[4] It can be asserted that normally instruments of that character provide for the continuation of the law in force on the day they come into effect to the extent that such law is consistent, or at least not inconsistent, with the new Constitution. There exist also instances in which the creation of the new sovereignty was itself regulated by international instruments. The inclusion of such provisions in these instruments is to some extent an exceptional step; it is in fact a consequence of the establishment of special international territorial régimes for specific purposes.[5] This was the case in Section 23 of the

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following Preamble: 'We the people of Indonesia . . . hereby ordain and establish our independence. . . .' Indonesia was admitted as the sixtieth Member of the United Nations on 28 September 1950. The documents dealing with the transfer of sovereignty regulated in great detail all foreseeable questions of state succession.

[1] Art. 21 of the Treaty of Peace with Italy of 10 February 1947 provided: '1. There is hereby constituted the Free Territory of Trieste. . . . The Free Territory of Trieste is recognised by the Allied and Associated Powers and by Italy, which agree that its integrity and independence shall be assured by the Security Council of the United Nations. 2. Italian sovereignty over the area constituting the Free Territory of Trieste . . . shall be terminated upon the coming into force of the present treaty.' Annex VI contained the text of the Permanent Statute of the Free Territory of Trieste, and in Annex VII is to be found the instrument for the provisional régime of the area.

[2] On 29 November 1947 the General Assembly adopted, in Resolution 181 (II), a plan of Partition with Economic Union for the future Government of Palestine. Nevertheless, from the legal point of view, the termination of the Mandate was achieved by the unilateral action of the British Parliament in passing the Palestine Act, 1948.

[3] The basic documents relating to the emancipation of Korea are the Cairo Declaration of 1 December 1943 and the Potsdam Declaration of 26 July 1945, on the basis of which the unconditional surrender of Japan was effected.

[4] As examples may be quoted: Section 129 of the British North America Act, 1867; Sections 108 and 109 of the Commonwealth of Australia Act, 1900; Section 135 of the South Africa Act, 1909; Art. 126 of the Constitution of Poland of 17 March 1921; Art. 142 of the Constitution of the Kingdom of the Serbs, Croats, and Slovenes (Yugoslavia) of 15–28 June 1921; Arts. 58 and 59 of the Organic Law of Transjordan of 16 April 1928; Vatican City, Law of June 1929 on the Sources of Law; Art. 111 of the Constitution of Syria of 14 May 1930; Section 15 of the Philippines Independence Act of 1934; Art. 192 of the Constitution of the United States of Indonesia of 1947.

[5] Cf. the dissenting Opinion by Anzilotti in the case of the *Consistency of Certain Danzig*

Annex to Article 50 of the Treaty of Versailles regarding the Saar Basin; Section 3 of the Annex to Article 88 of the same Treaty regarding the Plebiscite Area of Upper Silesia; Article 10 of Annex VII to the Treaty of Peace with Italy of 1947, establishing the provisional régime of the Free Territory of Trieste; Article 40 of the Draft Statute for the City of Jerusalem prepared in 1948 by the Trusteeship Council;[1] and Article XI of the Agreement of 11 September 1948 between the United States and the Republic of Korea.[2] Such instruments are international in form rather than in substance, although they do have the effect of excluding the exception of domestic jurisdiction. In some cases the instruments in question show a certain hesitation, at all events where the complete emancipation of a dependent territory otherwise than by the grant of Dominion status was formally brought about by the action of the metropolitan Parliament. Thus, both the Burma Independence Act, 1947, and the Palestine Act, 1948, of the British Parliament repealed certain enactments of that Parliament which had been extended to Burma or Palestine before the appointed day, i.e. the day of independence. But in each case the repeal was not to be construed as preventing the continuance in force of such enactments after the appointed day, as part of the law of Burma or Palestine.[3] These provisions seem to indicate that the continuation or lapse of

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Legislative Decrees with the Constitution of the Free City, Advisory Opinion of 4 December 1935 (*P.C.I.J.*, Series A/B, No. 65, p. 61). The question of the constitutionality of certain Danzig legislation was regarded by him as an internal question of Danzig law: 'International law does not come into it at all.' But in the view of the majority of the Court the fact that the guarantee of the League of Nations was involved was sufficient to supply the 'international element' (ibid., at p. 50).

[1] Doc. T/118/Rev. 2. The Report of the Working Committee to the Council (T/122) states that a provision for the 'continuity of existing law' conforms to the 'established principles of law'. As a statement of legal doctrine the accuracy of this proposition is perhaps open to question; as a description of a common practice it seems unobjectionable. In the revised draft of the Statute prepared in 1950 following upon the General Assembly's Resolution 303 (IV) of 9 December 1949, a similar proposal appeared in s. 6 of Art. 53 (Doc. A/1286, *Official Records of the General Assembly*, Fifth Session, Supplement No. 9).

[2] See Second Part of the Report of the United Nations Temporary Commission on Korea, Doc. A/575/Add. 4, p. 17 (ibid., Second Session, Supplement No. 9).

[3] Burma Independence Act, 1947, 11 Geo. VI, c. 3, s. 5 (3); Palestine Act, 1948, 11 & 12 Geo. VI, c. 27, s. 3 (2) (a). The Explanatory Memorandum to the Palestine Bill indicated that this provision 'repeals Acts of Parliament having application to Palestine, but leaves them to continue in force as part of the domestic law of Palestine'. This provision is overlooked by O'Connell in his Note on 'The British Commonwealth and State Succession after the Second World War', in this *Year Book*, 26 (1949), pp. 454–63, at p. 461. During the debate on the second reading of the Palestine Bill on 10 March 1948 the Attorney-General, Sir Hartley Shawcross, dealt with this point, but somewhat ambiguously. He said: 'So far as the law in Palestine is concerned, the position will be that the existing law will continue in operation. How far it continues in operation will depend upon what, if any, Power takes over the effective government of Palestine when we leave. . . . It is a well-established rule of international law . . . that the laws of a country which has been ceded, or abandoned, continue, in the presumption of international law, to be those which existed at the time of the cession, or abandonment' (*Parliamentary Debates*, House of Commons, vol. 448, cols. 1322–3.) Similarly in the House of Lords it was explained, with reference to Clause 3 of the Bill, that while certain Acts of Parliament would cease to apply to Palestine so far as the law of the United Kingdom was concerned, they would be left to continue

existing legislation in the new independent states is a matter for their sovereign will, and for that alone. On the other hand, where the emancipation led to Dominion status the imperial legislation usually included clear provisions for the maintenance in force of the existing law after the appointed day until it should be changed by the new sovereign authorities. In the case of India, however, the imperial legislation also regulated the introduction of changes consequential upon the partition of that country into the two new Dominions of India and Pakistan.[1]

Despite this there are precedents, by no means insignificant, in which both the international and the internal legislator are apparently silent on this matter, so that the lacuna has to be filled by reference both to principle and to decided cases. A good example of this is provided by the Ceylon Independence Act, 1947.[2] However, from the point of view of international law—and we are here concerned only with international law—the presence or absence of municipal provisions regulating the law to be in force in the territory concerned is immaterial. No one would deny that, unless restricted by treaty, as rarely happens, the new sovereign is free to enact what laws he likes. Legislative autonomy is one of the attributes of sovereignty; conversely, there exists a direct connexion between sovereignty and the right to legislate. The fact that the new sovereign re-enacts the previously existing law as his own is primarily a matter of obvious legislative and administrative convenience, but it is not of such a nature as to permit the drawing of hard-and-fast legal conclusions therefrom. The fact that the matter is so often regulated by a municipal law-creating act of the new sovereign has the consequence that the international legal element is liable to be overlooked.

Legal problems of this character cannot be discussed in complete isolation from their political background. Four distinct types of historical patterns of emancipation can be discerned from the history of the present century. The first pattern includes the new independent European states created or restored to independence by the peace treaties which brought the First World War to an end. In addition to the treaties concluded by the Allied and Associated Powers (the Versailles complex[3]), the newly formed Soviet Union regulated its relations with the states which seceded from the

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as part of the domestic law of Palestine unless and until they should be altered by the successor authorities. 'These authorities will thus inherit as a working basis an existing body of laws which, in its validity in Palestine, is in no way affected by this Bill' (*Parliamentary Debates*, House of Lords, vol. 154, col. 1207).

[1] The Indian Independence Act, 1947, 10 & 11 Geo. VI, c. 30, s. 18 (applicable to both India and Pakistan). Cf. also the English Statutes quoted above on p. 268, n. 4.

[2] 11 Geo. VI, c. 7, s. 4 and Second Schedule. It is specifically mentioned that certain stipulations, which affect the law of the United Kingdom, do not affect the law of Ceylon.

[3] This includes the Treaty of Versailles with Germany, the Treaty of Trianon with Hungary, the Treaty of Neuilly with Bulgaria, the Treaty of St. Germain with Austria, and the later Treaty of Lausanne with Turkey.

Tsarist Empire by a series of peace treaties.[1] These two series of treaties did not proceed along identical lines. At the same time contemporaneous arrangements providing for cessions of territories or for special temporary territorial arrangements occasionally included stipulations relating to municipal law. The second pattern also derives from the termination of the First World War, but was set in a different mould. The statehood of the territories formerly part of Asiatic Turkey was provisionally recognized, but not their independence, and the mandatory régime was evolved to accommodate this state of affairs to the Wilsonian principle of non-annexation.[2] Here, as in the case of the European secession states, the new statehoods, although recognized only provisionally, came into existence *ex tunc*, with the establishment of the mandatory régime;[3] and the withdrawal of the mandate, with the approval of the Council of the League, in the case of Iraq,[4] and with the formal *a posteriori* approval of the Assembly of the League in the cases of Syria, the Lebanon, and Transjordan,[5] was sufficient to transform this bare existence as a state into full independence. A somewhat similar arrangement was made after the Second World War in relation to the disposal of Italian Somaliland, with the difference, however, that the duration of the Trusteeship Agreement was limited in time.[1] Thirdly, there is the *sui generis* case of Palestine, which differs from the others not only in that the Mandate contained no obligation as explicit as that contained in, for example, Article 1 of the Mandate for Syria and the Lebanon (which enjoined on the Mandatory to enact measures to facilitate the progressive development of Syria and the Lebanon as independent states), but also because of the manner of the ending of the Mandate, which was achieved in consequence of the relinquishment of the Mandate by the Mandatory, followed by the partition of the country and the establishment of the independent state of Israel, in partial accord with the terms of a recommendation of the General Assembly. The arrangements proposed by the General Assembly in 1949 for the future of Libya exhibit similar features, also requiring them to be placed in a *sui generis* class.[2] Fourthly, there are the cases of emancipation of parts of Asia, achieved partly by the grant of complete independence by the home Government, as in the cases of the Philippines, Burma, and Indonesia, partly by the grant of 'Dominion status' almost indistinguishable from complete independence, as in the cases of India, Pakistan, and Ceylon, and, in the particular case of Korea, by the establishment of a special régime under the aegis of the United Nations following upon arrangements made by the Allied Powers during the Second World War.

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[1] This includes the Treaty of Riga between the Soviet Union and Latvia signed on 11 August 1920 (*League of Nations Treaty Series*, vol. ii, p. 195); the Treaty of Dorpat with Finland of 14 October 1920 (ibid., vol. iii, p. 5); the Treaty of Riga with Poland of 18 March 1921 (ibid., vol. vi, p. 51); the Treaty of Moscow with Lithuania of 12 July 1920 (ibid., vol. iii, p. 105); the Treaty of Tartu with Esthonia of 2 February 1920 (ibid., vol. xi, p. 30). Similar treaties were also concluded between the Ukrainian Soviet Socialist Republic and the secession states.

[2] It is frequently pointed out that the mandates system was in the first place evolved precisely for the Asiatic territories of the Ottoman Empire, and that its extension to the African and Pacific colonies of Germany was only a later development. What is probably the most authentic description of this process is contained in Dr. Ivan Kerno's Statement on behalf of the Secretary-General of the United Nations before the International Court of Justice in connexion with the Advisory Opinion of 11 July 1950 concerning the *International Status of South-West Africa* (*Pleadings, Oral Arguments, Documents*, 1950, p. 189).

[3] Had the Treaty of Sèvres with Turkey not proved abortive, this would have coincided with the entry into force of that Treaty. But political events outran the legal, and as a result the full entry into force of the Mandates, on 29 September 1923, despite their approval by the Council of the League on 24 July 1922, antedated the coming into force of the Peace Treaty with Turkey, which took place on 6 August 1924. There have taken place at least two international arbitrations postulated upon the existence of separate statehood, though not, of course, independence, of these mandated territories, namely, the *Ottoman Public Debt* case, decided on 18 April 1925 (*Reports of International Arbitral Awards*, vol. I (1948), p. 529); and the *Société Radio-Orient* case, between the Levant States under French Mandate and Egypt, of 2 April 1940 (ibid., vol. 3 (1949), p. 1871). There are a number of municipal decisions reaching a similar conclusion. A brief analysis of some of these will be found in Dr. Kerno's Statement already quoted (loc. cit., pp. 194 ff.). The texts of all the League of Nations Mandates are conveniently reproduced in U.N. Doc. A/70. The International Court of Justice in its Advisory Opinion on the *Status of South-West Africa* recognized the special international status of that territory while under mandate (see *I.C.J. Reports*, 1950, p. 128, at p. 132).

[4] This occurred on 28 January 1932 (see Evans, 'The General Principles governing the Termination of a Mandate', in *American Journal of International Law*, 26 (1932), p. 735. Iraq became a Member of the League on 3 October 1932.

[5] On 18 April 1946 the Assembly of the League of Nations, in connexion with the dissolution of the League, adopted a Resolution in which, *inter alia*, it welcomed 'the termination of the mandated status of Syria, the Lebanon and Transjordan, which have since the last session of the Assembly become independent members of the world community' (see League of Nations, *Official Journal*, Special Supplement No. 194, p. 58).

The manner in which the emancipation is achieved is of considerable legal importance, for it alone will determine whether or not the change involved a break in the chain of legal continuity. This, in turn, may be of far-reaching consequences where the establishment of the entity as a state and its independence are separated, in time, by a régime of mandate or trusteeship. For the existence of this special status means that the powers of legislation vested in the Mandatory or Trustee, like all his other powers, must be exercised in conformity with, and subject to, the terms of the Mandate or Trusteeship Agreement. In such cases the establishment of independence *may*, as has been the case in the past, legally take the form of a change of government, which obviously leaves untouched the municipal law in force prior thereto. But even so no legal impediment exists in the way of the new Government or its judicial authorities passing the existing legislation under review in order to test its compatibility with the Mandate or Trusteeship Agreement, with the intent that *ultra vires* enactments should be treated as void, and in the way of their doing so *proprio motu* and without the assistance of any special authorizing legislation. Political considerations may well prompt this, for example, when the termination of the special régime has been preceded by a period of unrest in the course of which special legislative measures may have been adopted. Such a review of existing legislation nominally retained in force may lead to important changes in it by operation of the judicial rather than the legislative process. On the other hand, the termination of dependent status may break the chain of legal continuity precisely because it removes the international limitations imposed by the terms of the Mandate or Trusteeship Agreement. In the same way the change of status will, if it is accompanied by the dissolution of the former entity, certainly involve a break in the chain of legal continuity, for in such circumstances there is not merely a change of government.

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[1] Resolution 289 (IV) of 21 November 1949 of the General Assembly: see Special Report of the Trusteeship Council in *Official Records of the General Assembly*, Fifth Session, Supplement No. 10 (A/1294).

[2] Resolution 289 (IV) of 21 November 1949.

The question we have asked is of considerable importance, though it must be admitted that it is somewhat academic. The problem possesses an intrinsic interest if it is considered as a question of abstract jurisprudence in connexion with a theoretical appraisal of the relationship between law and sovereignty. At the same time it has several far-reaching practical aspects. Thus, the matter can arise as a 'preliminary point' in the consideration of the applicability of the widely held view that according to international law a change of sovereignty does not operate to affect, in itself, duly acquired private rights, or valid private law relationships, subsisting in the territory at the time of the change of sovereignty. This might be taken to presuppose that a change of sovereignty does not in itself affect the municipal law—at all events the civil law—in force in the territory concerned. On the other hand, there is reason to believe, as will be seen later, that the rule, if it exists, is relative and not absolute. This relativity is sufficient to weaken considerably, if not to destroy entirely, the force of any such supposition. The matter is more likely to arise as a question of substance, for example, in connexion with the municipal law aspect of international treaties of a private law nature, which might lapse in consequence of the operation of the rule that states which are new international personalities start their life with a clean slate in the matter of treaty obligations;[1] or in connexion with a criminal prosecution after the change of sovereignty with respect to an act committed before the change of sovereignty;[2] or where the title to property depends upon prescription over a long period of years, during which a change of sovereignty occurred.[3] It may also have complicating repercussions in the sphere of conflict of laws, for example, in ascertaining the provisions of the *lex domicilii*,[4] or the proper law of a contract.[1] In these cases there may be a conflict of periods of limitation imposed upon the conflict of legal systems. These examples are not exhaustive.

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[1] See McNair, *The Law of Treaties* (1938), p. 450.

[2] See *infra*, pp. 282 ff.

[3] Cf. the *Case of the Demolished House in Kuševjal*, decided by the Yugoslav Court of Cassation on 18 November 1931 (*Annual Digest of Public International Law Cases*, 1931–2, Case No. 41).

[4] See *infra*, p. 281.

II

There appears, on the whole, to be general agreement among writers that a mere change of sovereignty in fact leaves unmodified the municipal law in force in the territory immediately before the change of sovereignty, or at least its substantive content. This conclusion is convenient and reasonable, although it is freely admitted that the assumption on which, in our view, it is correctly founded, namely, the implied will of the new sovereign, can equally be applied to achieve the opposite result, at all events in the case of cession. That assumption is not so easily applicable to the case of emancipation; for in all probability the new sovereign has no law of his own in existence at the moment at which the emancipation is first effective.

Before passing to the theoretical basis of the rule it is convenient to deal with its extent. Professor Hyde,[2] in a formulation which includes public law, is perhaps the most extreme of the writers. He cites with approval a passage from Beale[3] to the effect that law, once established, continues until changed by some competent legislative power, and is not changed merely by a change of sovereignty, and continues:

> 'It is not believed that even the public laws of the former sovereign form an exception and are directly affected by the transfer. It is doubtless true that such laws as are at variance with the constitution and laws of the new sovereign cease to operate, but the reason for such cessation is not to be ascribed to the bare change of sovereignty. It is attributable rather to conditions which are themselves consequences of that change. The very disappearance of the former sovereign with its distinctive and possibly arbitrary form of government leaves no room for the operation of laws designed to uphold it and contemplating its existence. Again, the fundamental law of the new sovereign may prevent it from accepting a grant of territory without either subjecting it to the application of certain organic institutions, or rendering inoperative existing statutes hostile to the spirit thereof.'

It may be noted that the inclusion, in the formulation, even of the public laws of the former sovereign is not fully supported, either by other American writers or, more particularly, by decisions of the American courts, despite their reliance on this continuity of law theory and on several principles of international law. Moore, for example, excludes laws of the former Government which have for their object a certain governmental public policy; they cease to have any force or effect after the sovereignty of the former Government has ceased. Moreover, he restricts the term 'municipal legislation' to such laws as relate to the internal affairs of the country and the relation of the people to one another,[1] although it is not clear what is the theoretical explanation for that severe limitation. Hackworth[2] quoted two cases decided by the Supreme Court of the United States in which the underlying principles were discussed. Thus, in *Ortega* v. *Lara*[3] it was said:

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[1] See the decision of the German Supreme Court cited in Wolff, *Private International Law* (2nd ed., 1950), p. 425.

[2] *International Law chiefly as interpreted and applied by the United States* (2nd ed., 1945), vol. i, p. 397. A similar view seems to be taken by Strupp, *Éléments du droit international public* (1930), p. 95, and Fauchille, *Traité de droit international public*, vol. i, Part 1 (1922), p. 390, as to the extension of the rule to public law, at all events unless it is incompatible with the new régime. There appear to be no judicial decisions other than those from the United States which go so far. Cf. the Judgment of the Permanent Court of International Justice of 22 March 1926 in the *Case concerning German Interests in Polish Upper Silesia* (*P.C.I.J.*, Series A, No. 7, p. 17).

[3] *Treatise on the Conflict of Laws* (1916), s. 131.

> 'By the general rule of public law, recognised by the United States, whenever political jurisdiction and legislative power over territory are transferred from one nation to another, the laws of the country transferred, intended for the protection of private rights, continue in force until abrogated or changed by the new Government.'

Less sweeping is the opinion of the Court in *Vilas* v. *City of Manila*:[4]

> 'That there is a total abrogation of the former political relations of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain. . . . But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler.'

In the *Annual Digest and Reports of Public International Law Cases* there are a number of examples in which these doctrines were applied and followed both in so far as concerns territory ceded to the United States[5] and in connexion with the influence of foreign territorial changes on the foreign law applicable by the American courts in accordance with the rules of private international law.[6] Among the writers who, in addition to Hyde, hold that the existing civil law remains in force by virtue of international law after a change of sovereignty mention may be made of Keith,[1] Hershey,[2] Kaeckenbeeck,[3] and Fauchille.[4] This view has also been followed in decisions of courts in Greece,[5] Syria,[6] Danzig,[7] and Germany.[8]

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[1] *Digest of International Law*, vol. i (1906), p. 304.

[2] *Digest of International Law* (1940), pp. 527 ff.

[3] (1906), 202 U.S. 399.

[4] (1911), 220 U.S. 345.

[5] E.g. *Porto Rico Railway, Light & Power Co.* v. *Amador et al.*, *Annual Digest*, 1919–22, Case No. 49, a case involving the grant of licences to operate as common carriers. It was held that the use of public places in Porto Rico was to be decided according to the principles of the freer common law prevailing in the United States, although private rights and civil law were retained 'by will of the American Government' after the territory was ceded by Spain; *People* v. *Perfecto*, ibid., Case No. 50, a case concerning newspaper comment upon the Philippine Senate, an act which was criminal under the Spanish Civil Code but not under American principles introduced after the American occupation; *Panama Railroad Company* v. *Bosse*, ibid., Case No. 51; *Maricopa County Municipal Water Conservation District Number One et al.* v. *Southwest Cotton Co. et al.*, ibid., 1931–2, Case No. 43; *State of Washington* v. *Rainier National Park Company*, ibid., 1935–7, Case No. 44; *Soto et al.* v. *United States*, ibid., Supplementary Volume, 1919–42, Case No. 47.

[6] *In re Wayda's Estate*, ibid., 1923–4, Case No. 44. In this case the Court ordered the property of the deceased, who had been domiciled in Galicia, which was in Austria at the date of death, to be distributed in accordance with Austrian law, although Polish sovereignty had been extended over the territory at the date of the trial.

On the other hand, there are several decisions, notably from Belgium, which proceed upon the basis that there is no rule of law compelling the maintenance in force of the previously existing law, and that, at all events in cases of cession, the law of the successor state is automatically substituted for that of the previous sovereign. Thus, where a loan in Austrian currency had been made in 1915 in Marienbad, then part of Austria-Hungary, the Belgian Court of Appeal in 1933 ordered payment to be made in Czech currency: 'Marienbad is now part of Czechoslovakia. Therefore the case is to be decided by reference to the law of that State, which has been substituted for Austrian law.'[9] A similar doctrine was evolved, after emancipation, by the Polish courts with respect to civil laws having a political objective, despite the refusal of the Permanent Court of International Justice to do so in the already cited Advisory Opinion concerning *German Settlers in Poland*, at any rate if it would conflict with the principle of respect for duly acquired private rights.[10] The doctrinal basis for this has been stated in the following terms:

> 'Neither generally binding principles nor any single rule of international law can be found which oblige a State which takes a territory under its sovereignty to take over at the same time laws which until then had been in force there. Such an obligation would, therefore, have to result in each case from special agreements concluded between the States in question. Such agreements, as forming special and exceptional law, must be interpreted most restrictively.'[11]

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[1] *The Theory of State Succession, with Special Reference to English and Colonial Law* (1907), pp. 27 ff.

[2] *The Essentials of International Public Law and Organization* (revised edn., 1927), pp. 219, 224.

[3] 'The Protection of Vested Rights in International Law', in this *Year Book*, 17 (1936), p. 1, at p. 8.

[4] *Traité de droit international public*, vol. i, Part 1 (1922), p. 390.

[5] *Salonica Appeals* case, *Annual Digest*, 1923–4, Case No. 45. See also *Occupation of Crete* case, ibid., 1925–6, Case No. 65, a case concerning inheritance.

[6] *Succession of Rizcallah Gazalé* case, ibid., 1927–8, Case No. 65, a case concerning inheritance.

[7] See the case noted but not fully digested in *Annual Digest*, 1931–2, p. 86.

[8] See the decision of the German Supreme Court of 24 September 1886 that 'existing private rights as well as the private law in force in a State remain unchanged through the disappearance of the State and its incorporation into another, in the absence of express contrary provisions' (cited in Bruns, *Fontes Juris Gentium*, Series A, Section II, vol. i, p. 115).

[9] *Lipschutz* v. *Böhmische Esconto Bank and Credit Anstalt*, *Annual Digest*, 1933–4, Case No. 41. Compare this with the American case of *In re Wayda's Estate*, referred to above, p. 275, n. 6.

[10] *Procurator General of Poland* v. *S.*, ibid., 1929–30, Case No. 45, a case concerning a condition attached to a grant of land, that the land could only be alienated by permission of the competent (Russian) authorities. Such a condition had a political foundation, and therefore fell to the ground upon the restoration of the Polish State.

[11] *Struzek* v. *District Appeal Committee for War Cripples in Lódź*, ibid., 1931–2, Case No. 42, concerning the right to a war pension under German law, which was not upheld after Polish sovereignty became effective in Upper Silesia. Nevertheless the Polish courts were not consistent, and what seem to be isolated decisions exist pointing in another direction. Thus in

This seems to be the view of several writers, notably Accioly,[1] Antokoletz,[2] Diena,[3] Feilchenfeld,[4] Spiropoulos,[5] and Bustamente,[6] who emphasize the element of convenience as well as the domestic character of the problem. Nevertheless, many of those who believe that the continuity of the law derives from a rule of international law also tend to search for some supposed or implied expression of the will of the new sovereign, and this, in the final analysis, has some affinity with the approach which looks to convenience as the key. This applies, to some extent, to the doctrine of promulgation as propounded by Kelsen,[7] and to the limitation, to which Udina draws attention,[8] imposed by the *ordre publique* of the new sovereign. If the continuity is in this way to be based on the will of the new sovereign, two consequences follow. The first is that the law ceases to be the law of the former sovereign, and becomes that of the new sovereign. Although there is occasional confusion, due partly to the irrelevant problem of the proof of foreign laws, which sometimes intrudes into the discussions, this is clearly admitted by some of the writers already cited, to whom must now be added Professor Guggenheim.[9] This has also been the view of the courts of several countries, including the United States of America[10] and Greece.[11] The second consequence is that the whole matter is normally one of domestic jurisdiction, so that *ex hypothesi* the practice itself is not based upon any alleged rule of international law. Once it is established that the matter is to be decided by domestic law only, it is of no importance, from the point of view of international law, whether the problem is resolved by application of a rule of convenience or on some other basis.

Polish State Treasury v. *District Community of Świecie*, ibid., 1929–30, Case No. 30, it was held that a certain agreement could not be considered immoral for the sole reason that the school which the Prussian Government had organized was to serve purposes of germanization. A Note (ibid., p. 54) points out that Polish courts have taken a different view of the continued validity of contracts or laws of an anti-Polish character where the primary purpose of the law or act was inimical to the idea of the restoration of the Polish State.

[1] *Traité de droit international public*, vol. i (French translation 1940), p. 200.

[2] *Tratado de Derecho Internacional Público* (2nd ed.), p. 384.

[3] Op. cit., p. 137.

[4] *Public Debts and State Succession* (1931), pp. 617–18.

[5] *Traité théorique et pratique de Droit international et public* (1933), p. 63.

[6] *Droit international public*, vol. iii (1936), p. 275.

[7] In his lectures on 'Théorie générale du droit international public', in *Hague Academy, Recueil des Cours*, 42 (1932), p. 121, at p. 327, he draws a clear distinction between state succession as a matter of international law and state succession as a matter of municipal law, excluding the latter from the compass of international law.

[8] 'La Succession des états quant aux obligations internationales autres que les dettes publiques', in ibid., 44 (1933), p. 669, at p. 757.

[9] *Lehrbuch des Völkerrechts*, vol. i (1948), p. 421.

[10] *Porto Rico Railway, Light & Power Co.* v. *Amador et al.*, *supra*, p. 275, n. 5.

[11] *Occupation of Crete Case*, *Annual Digest*, 1925–6, Case No. 65. That being so, the laws of the annexed territory are not, in Greece, regarded as foreign laws which require proof, thus, as is pointed out in a Note in the *Annual Digest*, fully accepting the theory of state succession. A similar view was also taken with regard to judgments rendered by the authorities of the ceded provinces prior to annexation (see ibid., 1929–30, p. 72).

This makes it necessary to examine more fully which of these two views is correct. It is convenient to base the inquiry on the doctrine propounded by Beale and adopted by Hyde. Beale seems to base his approach upon what might be termed the theory of the absolute permanence of a legal norm until it is changed by an authority competent to do so, and that independently of any changes of sovereignty.[1] The fundamental weakness of this theory is that it overlooks any connexion between law *per se* and sovereignty *per se*, and thus cannot take account of the automatic effect of change of sovereignty on law. This automatic effect derives from the connexion which international law sees between the law-making act and sovereignty. The existence of such a connexion is a basic principle of international law. It is more easily demonstrated than described. Thus it is believed that where an international agreement lays down that a certain system of law shall be applied in a certain area, that area will legally be part of the territorial domain of that sovereignty to which that system of law is attached unless, of course, the international agreement clearly provides otherwise. Two examples may be mentioned. The first is that in Article 78 of the Treaty of Versailles which laid down that between the date of the Armistice, 11 November 1918, and the coming into force of the Treaty, German law was to be applied in Alsace-Lorraine even by the French courts. In so doing it was acting out of deference to what was then the established doctrine of international law, namely, that military conquest alone does not affect legal sovereignty over the conquered territory and that sovereignty is not transferred except by the entry into force of the treaty of peace. From this it follows that the law of the former sovereign remains in force until the change of sovereignty is effected by the entry into force of the treaty of peace. The second example, also taken from the Treaty of Versailles, is afforded by the arbitral award given by Dr. Robert Fazy on 4 September 1934 in the case of the *Pensions of Officials of the Saar Territory*, between Germany and the Governing Commission of the Saar Territory. Article 23 of the Statute of the Saar Basin, annexed to Article 50 of the Treaty of Versailles, provided for the maintenance in the area of the (German) law in force on 11 November 1918, although the government of the Territory was entrusted to a Commission representing the League of Nations. Dr. Fazy found that:

> '. . . throughout the duration of the Saar Statute the Saar Territory remained part of the German State—and of the territory under German law—only with the exception that the powers of government were . . . transferred to the League of Nations as trustee,

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[1] Op. cit., s. 131, quoted by Hyde, op. cit., at p. 398. Cf. also *Panama Railroad Company* v. *Bosse*, *Annual Digest*, 1919–22, Case No. 51, where Mr. Justice Holmes, delivering the opinion of the United States Supreme Court, said: 'The President's order continuing the laws in force was merely the embodiment of the rule that a change of sovereignty does not put an end to existing private law.' For a sharp criticism of this theory see Feilchenfeld, op. cit., pp. 617–18.

and that the Governing Commission that was to be set up by the League . . . was entitled to modify German law in so far as required in the execution of the Treaty of Versailles. . . . It [i.e. the instant dispute] is thus a dispute between the German Reich and an autonomous part of the Reich.'[1]

This connexion between law, including the act of law-making, on the one hand and sovereignty on the other, is sufficient to raise serious doubts as to how far it is correct to say that law is not changed merely by a change of sovereignty. These doubts are strengthened when it is remembered that, as has been seen, in so many cases the change of sovereignty is in fact accompanied by a break in the chain of legal continuity. Were Beale's view correct, one result would be that if, after a change of sovereignty, the new sovereign took no steps of his own to clarify the law to be in force in his domains, he would be automatically subjected to the law-making acts of another—and, to him, foreign—sovereign. Yet such subjection, even if only theoretical, runs contrary to fundamental notions of international law, whether the classic law which is based upon the sovereignty of states, or the modern ideas of the mutual interdependence of states. If it is accepted that international law itself has no rules on the subject, which indeed is one of domestic jurisdiction, it would appear to follow from the postulated connexion between the law-making act and sovereignty that the silence of the new sovereign in the matter of the municipal laws to be in force in his territory is as much an act of sovereignty as any explicit enactment of his. The question really reduces itself to this: Is the new sovereign's silence on this matter to be interpreted as an expression of his will, and as a law-making act, to continue with the old law for the time being? Despite the weight of authority adduced by Hyde, it is believed that other reasons are more decisive and that the silence of the new sovereign has to be regarded as an act of sovereignty which produces effects of a law-making character. This is not the only consequence of Beale's theory. There is no doubt that the existence of a legal system is an essential condition of statehood. This is a truism of law as much as of politics.[2]

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[1] *Reports of International Arbitral Awards*, vol. iii (1949), p. 1553, at p. 1564. Applications of the same principle are to be seen in the Judgment of the Permanent Court of International Justice on the merits of the *Memel Statute* case (*P.C.I.J.*, Series A/B, No. 49, p. 294, particularly p. 313); and the *Tacna-Arica Arbitration* between Chile and Peru (*Reports of International Arbitral Awards*, vol. 2 (1949), p. 921, at p. 934). But this presumption is, of course, finally rebutted if there is a clear renunciation of sovereignty, even if the international society becomes trustee of the area over which sovereignty is renounced: cf. Art. 21 (2) of the Treaty of Peace with Italy of 1947, relating to Trieste, and Art. 23 (1) relating to the Italian colonies. The fact that parts of these colonies have come under international trusteeship does not, of course, operate to restore Italian sovereignty. There is no analogy with the Saar, despite the use of identical language.

[2] See Locke's aphorism: 'A government without laws is, I suppose, a mystery in politics inconceivable to human capacity and inconsistent with human society' (*Two Treatises of Civil Government* (1690), Everyman's Library edition, p. 228).

III

It would appear from the inquiry here undertaken that, subject to the terms of internationally binding stipulations or positive provisions of municipal law, the municipal law previously in force within the territory will remain in force therein after a change of sovereignty, whether that change takes place as the result of cession or as a consequence of emancipation. The legal consequences of that common practice are that the law takes effect as though it were the municipal law of the new sovereign. He is presumed, in the absence of express enactment, to have enacted it as his own. Strictly speaking, the matter will normally fall within the conception of domestic jurisdiction: international law is not directly concerned. The term 'municipal law' certainly includes all laws other than those governing the political rights and duties of the inhabitants of the affected territory. In other words, that part of the positive law which regulates the political rights and duties of the inhabitants and the relations with the central government will remain in force after the change of sovereignty only if there is an express enactment to that effect by the new sovereign. However, with regard to the local authorities, including such aspects as municipal franchise, municipal taxation (rates), and the quasi-criminal jurisdiction exercisable by some municipal authorities in connexion with infringements of municipal by-laws, these are regarded as matters of private law. Similarly, incorporated bodies—such as commercial trading companies and the like—public utility undertakings, incorporated societies for educational, scientific, charitable, and other non-profit-making purposes, and local authorities, when formed under provisions of the general statutory law (including, where the constitutional circumstances so require, those formed under private Acts of Parliament or the equivalent) are regarded as private-law relationships whose existence is unimpaired by a mere change of sovereignty. Such bodies, however, as were specially created by the former sovereign in pursuance of his sovereign aims—which may be of a political or economic character—belong to the sphere of public law and public-law institutions, and are brought into liquidation by a change of sovereignty.

As a result, the expression 'continuity of law' has a specialized and technical meaning. The word 'continuity' is only applicable to the substantive content of the law in the sense that the positive rules of the 'new' law are identical in content with the positive rules of the law previously in force. As Kelsen has put it in the passage already cited, the source of their validity has changed. Strictly speaking, the 'old' and the 'new' laws are foreign to each other,[1] and the fact that despite this no special form of proof of the 'old' law may be required in the courts of the new sovereign is of little significance. Secondly, it is suggested that, strictly speaking, legal relations and legal institutions which received their vitality from the 'old' law are dissolved with the change of sovereignty. However, the automatic re-enactment of the 'new' law brings in its train their re-creation, automatically, as relations and institutions deriving their vitality from the 'new' law, and from that alone.[1] Professor Wolff, for example, in his *Private International Law*, points out that a delicate problem confronts us when the place of the domicil of origin has undergone a change of sovereignty either by cession of the territory to another state or by the foundation of a new state, while the person concerned had a domicil of choice elsewhere. He suggests that in such circumstances the domicil of origin is to be considered as that of the old sovereign—a view which is based on the technical rule of English law that a previous domicil is established by reference to an entire area and not any particular physical point therein. This view has something to commend it, having regard to this technical aspect of domicil, when the change of sovereignty is the consequence of cession. But it is doubtful whether it can hold good when the change of sovereignty is the consequence of emancipation, with or without the extinction of the former state.[2] In such cases the law of the domicil of origin will have to be the law of the new state. Only in such a way can true effect be given to the rule that a change of sovereignty does not operate to affect, of itself, duly acquired private rights or valid private-law relationships subsisting at the time of the change of sovereignty. Indeed, but for this it would be impossible to achieve that relativity of these private rights and relationships the existence of which has been so eloquently demonstrated by Kaeckenbeeck.[3] For otherwise such private rights and relations would become frozen, and while, before the change of sovereignty, the former sovereign might well have been entitled, so far as international law is concerned, to modify them by legislation, it would be arguable—to say the least—that the new sovereign

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[1] Cf. Hostie, 'Contribution de la Cour Suprême des États-Unis au développement du droit des gens', in *Recueil des Cours*, 69 (1947), p. 241, at p. 330. Speaking of the maintenance in force of old laws after the annexation of territory by the United States, he says: 'Le droit, qui subsiste

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en principe, n'est pas pour le nouvel souverain, un droit étranger . . .; c'est un droit national, autant que le droit d'un État de l'Union.'

[1] See Feilchenfeld, op. cit. For the influence of a treaty cf. the *Mavrommatis Palestine Concessions* case (*P.C.I.J.*, Series A, No. 5, at p. 29).

[2] Op. cit., p. 111. In the first edition of this work, at p. 112, he adopted the opposite conclusion. In another place he speaks of the *extinction* (our italics) of a legal system when sovereignty over a state is transferred from one state to another by international treaty (op. cit., p. 425). His example again refers to cession and not to emancipation.

[3] Loc. cit., pp. 13 ff.: 'Enactment of legislation infringing the vested rights of foreigners does not *per se* involve the international liability of a State. . . . Apart from international obligations accepted by the State as such under a treaty or otherwise, the question when the legislature should overrule vested rights or capitulate before them is always and exclusively a question of policy, of public interest, which the State alone is competent to decide.' See further the same author's 'La Protection internationale des droits acquis', in *Recueil des Cours*, 59 (1937), p. 321. Cf. also the dissenting Opinion of Alvarez before the Hungarian-Czechoslovak Mixed Arbitral Tribunal, quoted in Stuyt, *The General Principles of Law* (1946), at p. 83.

would be barred from so doing, at all events to the extent that *his* new legislation would prejudice, diminish, or cancel valid subsisting private rights and relationships. If, as we think, the word 'continuity' has this specialized meaning in the rare cases in which the 'old' law is *presumed* to have been re-enacted by the new sovereign as the 'new' law, how much more is it so where the new sovereign takes active steps to enact, as a matter of his positive law, that the law which existed in the territory prior to the change of sovereignty shall remain in force (with or without modification, including that deriving from a *clausula rebus sic stantibus*), subject to future legislative changes.[1] In fact, the mere existence of such legislation serves to snap irrevocably the chain of notional continuity. Such legislation operates in much the same way as an express novation of a contract, and the absence of new legislation operates to the same extent as an implied novation.

IV

The views expressed above may suitably form the starting-point for a consideration of the problem of criminal law. The number of judicial decisions in which the question of the impact of a change of sovereignty upon municipal criminal law has been relevant is small. On the other hand, the theoretical considerations seem to have been more closely analysed in this particular field. One reason for this is perhaps to be found in the widely accepted principle of law: *nulla poena sine lege*. The deep hold which that conception has on the minds of men leads to a greater degree of care in defining clearly the conditions which have to be established before an act can be held criminal and its perpetrator punished than is sometimes the case in civil law. General principles of customary international law in so unsettled a branch of the law as state succession or the consequences of a change of sovereignty cannot normally supply, with requisite clarity, the basis for a successful criminal prosecution—even if they are relevant at all. Possibly the matter may have to be decided by reference to the policy of the relevant municipal law in regard to the doctrine of incorporation of international law.[2]

The few cases bearing on the matter which have been included in the *Annual Digest of Public International Law Cases* indicate that successor states have constantly adopted the practice of trying and punishing offenders found guilty of criminal acts under the laws of the new sovereign, regardless of the time when the act of which complaint was made had been committed. Some of these cases turn on the interpretation of statutes enacted by the new sovereign and do not therefore illustrate the matter here discussed.[1] On the other hand, instances are to be found in which the basis of a municipal statute is not obvious, or in which the generalities of the municipal enactment open the way to wide judicial discretion. Thus the Yugoslav Court of Cassation held in the *Case of the Demolished House in Kuševjal*[2] that notwithstanding the fact that an offence was committed at a time when the *locus in quo*, subsequently ceded to Yugoslavia, was under Turkish sovereignty, it had to be tried under Yugoslav and not under the Turkish laws. The report, unfortunately, is incomplete, and no reasons are given for this decision.

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[1] For the application of this clause in an international instrument see Judgment No. 7 of the Permanent Court of International Justice in the case concerning *German Interests in Polish Upper Silesia* (*P.C.I.J.*, Series A, No. 7).

[2] A brief perspective of the modern attitude of various countries in regard to this problem will be found in *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, Memorandum submitted by the Secretary-General: Doc. A/CN.4/1/Rev. 1. See also Lauterpacht, 'Is International Law a Part of the Law of England?', in *Transactions of the Grotius Society*, 25 (1939), p. 51, and the same author's 'Règles générales du droit de la paix', in *Recueil des Cours*, 62 (1937), p. 99, particularly pp. 129 ff.

Two important cases in this field were decided by the Italian Court of First Instance at Addis Ababa in respect of criminal acts committed before the Italian annexation of Abyssinia. In the first case, *In re Simi*,[3] the accused had been arrested after the Italian occupation but before the formal annexation, for having in his possession goods presumed to have been stolen. The King's Proctor asked the Court not to proceed with the case on the ground that it concerned a foreigner prosecuted for a crime committed abroad, and also that the accused had acted in accordance with instructions issued by the former sovereign shortly before the Italian occupation. On the first point it was held that the Court had jurisdiction; on the second that the accused must be acquitted because he acted in accordance with instructions given by the authorities. This shows the existence of a conception of double criminality. Replying to the contention of the Prosecutor that the Court had no jurisdiction since Articles 7–10 of the Penal Code, which dealt with prosecutions in Italy of crimes committed abroad, did not cover the present case, the Court said:

> 'The Italian State, following the annexation, is the successor of Ethiopia. Accordingly, crimes committed prior to the annexation must be regarded as having taken place in Italian territory. To apply Article 7 and the following in the circumstances would be a regrettable formalism; it would amount to obeying the letter of the law without regard to its purpose and its spirit. If prosecutions could not be brought for crimes committed prior to the annexation, this would amount to denying full Italian sovereignty and to renouncing one of its fundamental and essential attributes. . . .'

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[1] E.g. *People* v. *Perfecto, Annual Digest*, 1919–22, Case No. 50; *Soto et al.* v. *United States*, ibid., Supplementary Volume, 1919–42, Case No. 47; *Balzac* v. *People of Porto Rico*, ibid., Case No. 30 (all cases decided in the United States of America).

[2] See ibid., 1931–2, Case No. 41. This case also involved an important point of prescription, the period of time running from before the change of sovereignty.

[3] Ibid., 1935–7, Case No. 46.

In the second case, *In re Broussalian*,[1] the accused was prosecuted before the same Italian Tribunal for having embezzled goods in 1935, i.e. prior to the annexation of Abyssinia by Italy. Here again it was contended that the Court had no jurisdiction since this was a trial for a crime committed by a foreigner in a foreign country. The Court held that it had jurisdiction. It found that by virtue of Article 2 of the Italian Penal Code, Abyssinian law was applicable as the law in force at the time when the crime was perpetrated. Since the time limit allowed by Abyssinian law for bringing a prosecution for embezzlement had elapsed, the Court acquitted the accused.

The cases discussed above arose out of a change of sovereignty consequent upon cession or annexation. Israel, however, provides examples of the problem as it appears after a change of sovereignty involving 'emancipation'. The short point in *Katz-Cohen* v. *Attorney-General*[2] was whether a crime (murder) committed in Tel Aviv before the termination of the Mandate and the establishment of the state of Israel could be tried in the courts of Israel and punishment inflicted. A few days after the establishment of the state of Israel the Law and Administration Ordinance, 5708–1948,[3] was enacted, which provided, *inter alia*, that the law which existed in Palestine on 14 May 1948 (the date of the termination of the Mandate)[4] shall remain in force. It was argued on behalf of the accused that murder is a crime against the state, and that on a change of sovereignty the crime cannot be punished in the absence of clear and express provisions in the law of the new sovereign. The Israel Supreme Court rejected this argument. It said:

> 'Feelings of justice rise in revolt against a conclusion such as this which would imply a gap in the criminal law brought about by the transition from sovereign to sovereign . . . and only an express term of the law will compel me to accept it. . . . The root of the appellant's argument is the fundamental distinction between civil and criminal procedures. He repeatedly stressed that every criminal act is a blow to the community and the State. This is correct, and from it it emerges that not the individual, but the injured community demands the punishment of the offender. Why, then, in the present case should not the same community, against whom the offence was committed, not demand its punishment merely because the Government of Israel has now replaced the Mandatory Government?'

After citing passages from Oppenheim's *International Law* (vol. i, §§ 80 and 81) and Hyde's *International Law* (2nd ed., 1945, vol. i, ss. 120 and 122) the Court said:

> 'Neither of these books says anything to suggest that there is no right to punish for

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[1] *Annual Digest*, 1935–7, Case No. 47.

[2] *Pesakim* (*Israel Law Reports* (unofficial)), vol. ii (5709–1949), p. 216. This case has not yet been reported in an English translation.

[3] *Iton Rishmi* (*Official Gazette* of the Provisional Government of Israel) of 21 May 1948, Supplement No. 1, p. 1.

[4] Cf. the Palestine Act, 1948, s. 1.

acts committed before the creation of the new sovereign. On the contrary, Hyde is strong authority for the reverse proposition. From him we learn the golden rule of continuity of law despite change of sovereignty. The exception, as he rightly points out, is in the case of laws which stand in contradiction to the Constitution and laws of the new sovereign. . . . Murder and manslaughter are offences against the person, and they, as well as most other criminal offences, are such that continuity of law and continuity of power to punish from sovereign to sovereign are axiomatic, and change of sovereignty does not affect this continuity, for the public welfare demands this result, as the change of sovereignty does not prevent it. . . . The Law and Administration Ordinance . . . establishes the continuity necessary for the power of punishment. . . . Under Section 11 . . . the law was not re-enacted as new law of the State of Israel . . . but *remained* in force, and this gives us continuity from the legal point of view. . . . There is no authority in international law against such continuity. On the contrary, there are ample authorities in favour of it on changes of sovereignty, even without specific enactment. . . .'[1]

The difference between the Italian and the Israel cases is striking. The Italian courts, openly admitting that rules of international criminal law in matters of state succession are non-existent, based the right of the Italian authorities to bring to trial and punish crimes committed before their sovereignty became effective squarely upon the doctrine of sovereignty, coupled with a firm denial that the matter concerned international law at all. This view approximates to the general conclusions reached earlier in this article. The Israel Court, on the other hand, based its decision upon Hyde's doctrine of continuity of law and looked on the municipal statute not so much as achieving a novation of the law in the sense described above, but as merely confirming the assumed rule of international law laying down the principle of continuity of law in the event of change of sovereignty.

Among writers Fauchille has attempted the most detailed examination of this problem, which he approaches as a consequence of cession. He bases himself not so much on law as such as on the exercise of jurisdiction; that is to say, he is concerned more with the effect of cession in so far as concerns the determination of what is the appropriate law-applying organ, and the extent of its powers, than with the law itself. In this he follows the attitude adopted in international treaties, several of which he quotes. He starts from the proposition that after a cession of territory the independence of the acceding state precludes a foreign, i.e. the former authority, from performing any jurisdictional acts on the territory it has ceded. Referring, in the case of criminal jurisdiction, to the specific instance wherein an offence was committed in the territory before the change of sovereignty but was not tried and punished, he says:

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[1] This precedent was followed in the later case of *Wahib Saleh Kalil* v. *Attorney-General*, *Piskei-Din* (*Israel Law Reports* (official)), vol. iv (5710–1950), p. 75. The facts here were identical, save that when the offence was committed the *locus in quo* was outside the area which was to have formed part of the Jewish State under the original United Nations Resolution 181 (II) recommending the partition of Palestine, although by the time of the trial the whole had come under Israel sovereignty. It may be mentioned that the Israel courts adopted towards an amnesty granted early in 1949 an attitude similar to that adopted by the Italian courts.

> 'Le droit de poursuivre l'auteur de l'infraction et de lui infliger une peine appartient incontestablement aux juges de l'État annexant; sur ce territoire, en effet, l'État annexant est substitué à l'État démembré en ce qui concerne les droits de souveraineté. —La juridiction, l'instruction seront déterminées par les lois du pays annexant.'[1]

If the proposition which forms the basis of this approach is correct, as it is believed to be, it follows that there exists in this context no essential difference between cession and emancipation. Accordingly, if for reasons connected with the exclusiveness of the jurisdiction of the territorial sovereign, the new territorial sovereign is competent to try and punish offences committed in his territory before its cession to him, the same reasoning would be applicable, and would lead to the same result, in the case of emancipation. For this reason, that part of the judgment of the Italian Tribunal in *In re Broussalian* which refers to 'sovereignty in general' is open to some criticism. It may be doubted whether there exists a 'sovereignty in general'. In so far as it does exist, there is little unanimity as to what exactly is comprised in the term. As Dr. Huber said in the *Island of Palmas Arbitration*:

> 'International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.'[2]

Sovereignty, of course, implies a power to legislate, and to punish infractions of the criminal law. Each instance of legislation and each instance of punishment is a particular manifestation of a particular sovereignty and cannot easily be related to so vague a conception as sovereignty in general. The particular sovereignty may have been in existence when the act was committed; it may have disappeared before trial. In that case that sovereignty cannot bring the accused to trial. Or it may not have been in existence when the act was committed. In that case it can properly bring the accused to trial and punish him, if the act was a crime at the time it was committed. There is no self-evident principle of international law which prevents the sovereign existing at the date of the trial from taking such action in such circumstances.

This does not, however, exhaust the topic of criminal law. Under the principles suggested earlier in regard to municipal law in general, it was submitted that a distinction ought to be made between public and private law inasmuch as only the latter continues in force, under the doctrine of the implied act of legislation, after the change of sovereignty. However, the application of this principle in the sphere of criminal law is not altogether simple. Criminal law itself contains both a 'public' and a 'private' element. Following the titles commonly found in English law, it can be said that offences against the state such as treason, certain offences against public order and the authority of the Constitution, and such offences as bribery and corruption, counterfeiting the coinage, and so on, are 'public' in the sense that they are, or may be, acts which are connected in an intimate manner with the sovereign existing at the time the alleged offence was committed. They belong to what has been described as offences directed at the personality of the state.[1] Bearing in mind the public disorders which frequently precede a change of sovereignty, it is not unlikely that many acts of that character were committed with the precise object of inducing the change of sovereignty. The criminal character of offences of this nature committed in these circumstances probably does not outlast the change of sovereignty. In other words, the liability to trial and punishment lapses when the sovereignty against which they were directed disappears. However, the 'public' parts of the criminal law itself do not lapse on the change of sovereignty in the same way as the municipal public law, i.e. the law regulating the political rights and duties of the inhabitants and their relations with the Government, lapses. These parts of the criminal law continue to exist as though they had impliedly been enacted by the new sovereign. The other parts of the criminal law, especially those which concern offences against the person and offences against property, can be classified as 'private criminal law'.

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[1] Fauchille, op. cit., vol. i, Part 1, p. 370.

[2] *Reports of International Arbitral Awards*, vol. 2 (1949), p. 829, at p. 839. For a recent denial of the 'super-State' idea see the Advisory Opinion in the case of *Reparation for Injuries suffered in the Service of the United Nations* (International Court of Justice, *Reports*, 1949, p. 174, at p. 179).

V

The constitutional and legislative texts cited above, as well as the writings of publicists, have as their object the clarification of the substantive law, and it is with that alone that they are concerned. This is also true of those international instruments which are essentially of a constitutional character in the sense that they contain quasi-legislative provisions of municipal law. As already noted, these are measures for exceptional purposes.[2] International instruments proper are concerned not so much with the substantive provisions of the law, i.e. with the consequences on the municipal law of a territory of changes of sovereignty over that territory, as with problems of jurisdiction and the administration of justice which arise out of the territorial changes. The reason for this is that while the detailed prescriptions of a system of municipal law are not normally of direct concern to the international society, the position is different with regard to the avoidance or the regulation of jurisdictional and administrative disputes. Fauchille, for example, cites the Treaty between Denmark and the United States of 4 August 1916 regarding the cession of the Danish West Indies, and Article 78 of the Treaty of Versailles concerning the execution of judgments in the ceded areas of Alsace-Lorraine, as well as analogous provisions in Article 45 of the Treaty of St. Germain relating to Austro-Hungarian territory ceded to Italy. These general international Conventions are supplemented by a long series of special bilateral Conventions, the general object of which is to facilitate as far as possible the completion of legal business affected by various territorial changes after the First World War in the light of the specific problems of each area.[1] The immediate purpose of these bilateral Conventions is to clarify the jurisdiction of the courts in the territories concerned in both civil and criminal matters, to arrange for the transfer of proceedings from the courts of the old to those of the new sovereign, and also to provide for the execution of judgments and for mutual judicial assistance between the old and the new authorities. The transfer of criminal cases carries with it the right of execution of the sentence and the right of pardon. Only rarely, and for exceptional circumstances, do these Conventions contain express stipulations as to the law to be applied. The provision in Article 78 of the Treaty of Versailles that all prosecutions in Alsace-Lorraine for offences committed during the period between 11 November 1918 and the coming into force of the Treaty shall be conducted under German law except in so far as this has been modified by decrees duly published on the spot by the French authorities, lends support to the view that international law presumes that normally in such circumstances the municipal court will apply its own law.

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[1] See Pella, 'La Répression des crimes contre la personnalité de l'état', in *Recueil des Cours*, 33 (1930), p. 677.

[2] See *supra*, p. 268.

This relative absence of interest in the content of municipal law, and with it the assumption that the law in force before the transfer of sovereignty may not necessarily subsist after that event, finds another expression in those occasional international stipulations which, so to speak, freeze wholly or in part the law existing before the change of sovereignty or which otherwise restrict the legislative autonomy of the subsequent sovereign. This type of stipulation is contained in paragraph VI of the Decree of the Conference of Ambassadors of 5 August 1920[1] concerning Teschen, Spisz, and Orava. Under that instrument, for a period of twenty-five years no legislative measure relating to mining, industrial, or commercial undertakings shall be put into force in the said districts unless it be made equally applicable throughout the territories of Poland and Czechoslovakia respectively. Other judicial and administrative matters were to be settled privately between the two countries 'in conformity with the principles adopted in the Treaties of Peace with Austria and Hungary', i.e. Article 78 of the Treaty of Versailles above mentioned. Somewhat similar is Article 11 of the Treaty of 10 August 1920 between the British Empire, France, Italy, Japan, and Greece concerning the protection of minorities in Greece.[2] Under this provision, 'for a period of six months after the coming into force of the present treaty Greece undertakes not to introduce any new regulations modifying the land system in the territories acquired by Greece under the treaties terminating the war of 1914–1919'. This prohibition would prevent the introduction of Greek land law during the period in which it was in force. These two examples emphasize the exceptional character of such stipulations. For the former related to a situation of disequilibrium in the new European power system established after the First World War, while the second was designed to facilitate the transfer of populations and the concomitant liquidation of their possessions agreed upon between Greece and Turkey.

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[1] See, e.g., the Convention between Germany and Denmark of 12 July 1921 concerning the transfer of the administration of justice in Northern Sleswig (*League of Nations Treaty Series*, vol. viii, p. 398); Convention of 12 April 1922 between Germany and Poland concerning the transfer of jurisdiction in the plebiscite area of Upper Silesia (ibid., vol. xxi, p. 328); Convention between Germany, Poland, and the Inter-Allied Commission of 15 June 1922 relating to the transfer of jurisdiction in the plebiscite area of Upper Silesia (ibid., p. 464). See also the remarks contained in the Dissenting Opinion of Van Eysinga in the *Panevezys-Saldutiskis Railway* case (*P.C.I.J.*, Series A/B, No. 76, at p. 32): 'The legal life of the new State in all its aspects proceeds in succession to the legal life of the old State. Thus in all matters where the Government of the latter had jurisdiction its place is now taken by the Government of the new State.'

The five Treaties of 1920–1 which terminated the war in Eastern Europe and stabilized relations between Soviet Russia and the new independent states on her borders also dealt with these problems, though on somewhat different lines. There again emphasis was on the practical administration of justice rather than on the substantive provisions of the law. The common stipulation in all these treaties was that

> 'the decision of any questions of public or private law which may arise between the citizens of the contracting parties, and the settlement of certain special questions between the two governments, or between one of the contracting governments and the citizens of the other, shall be carried out by special Joint Commissions which shall be formed immediately upon the ratification of the treaty'.

The composition, rights, and duties of the Commissions were to be fixed by 'instructions' to be confirmed in the case of each Commission by agreement. Among the specific duties of these Commissions, as laid down in the treaties of peace, was the settlement of questions relating to the division of archives of the administrative and judicial bodies, of the civil records, and of the registers and documents relating to current business of these bodies. These mixed Commissions apparently never functioned, on account of the refusal of the Soviet delegates to participate in their work.[1] The questions of public or private law to which the treaties referred were in consequence never settled in the manner envisaged in the treaties. The Peace Treaties of 1947 which terminated the Second World War do not refer to this matter, despite the territorial changes which they introduced. The first forty volumes of the *United Nations Treaty Series* do not reveal the existence of bilateral agreements similar to those concluded after the First World War.[2]

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[1] *L.N.T.S.*, vol. ii, p. 49.

[2] Ibid., vol. xxviii, p. 243.

VI

The conclusions reached in the preceding sections may be recapitulated as follows:

(*a*) After a change of sovereignty, however caused, the law in force in the territory affected by the change of sovereignty is, regardless of its substantive content, the law of the new sovereign, from whom alone its validity is derived. This is the necessary result of the intimate connexion that exists between law and sovereignty. The common practice is for the new sovereign to clarify by means of a legislative enactment what this law will be. The weight of practice is in favour of enacting the maintenance of the law in force in the territory immediately before the change of sovereignty is carried into effect, and this is generally subject to the condition *rebus sic stantibus*. There is no rule of international law which compels the maintenance in force of any part of the municipal law in operation in the territory prior to the change of sovereignty. In general, the matter comes within the conception of domestic jurisdiction. In the absence of any express enactment the new sovereign will be presumed to have decided to maintain the previously existing law in force, except those parts of it which were intimately connected with the personality and the public policy of the former sovereign, and again subject to the condition *rebus sic stantibus*. The reason for this presumption lies solely in requirements of convenience. It can therefore be easily displaced. This conclusion applies equally to civil and to criminal law.

(*b*) It follows that legal institutions and legal relationships, whether of a civil or of a criminal character, which derived their validity from the law of the former sovereign are theoretically extinguished with the termination of that sovereignty. Normally, however, they will automatically revive as legal institutions and legal relations deriving their validity from the law of the new sovereign. An exception exists in the case of those legal institutions and relations closely connected with the personality and the public policy of the former sovereignty which are not consonant with those of the new sovereignty. These will not survive the change of sovereignty.

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[1] See Rundstein, 'L'Arbitrage international en matière publique', in *Recueil des Cours*, 23 (1928), p. 331, at p. 410. According to this author this abstention did not prevent the Polish Supreme Court from holding that matters submitted to the competence of the mixed Commission by the Treaty of Riga were withdrawn from the normal jurisdiction of the Polish courts. The abstention of the Soviet representatives from the mixed Commissions closed the door to a judicial settlement of disputes with Soviet citizens arising out of the First World War.

[2] For some isolated decisions concerning a Judiciary Convention between France and the Saar of 3 January 1948 see *Journal du droit international*, 77 (1950), pp. 565 ff.

(*c*) In the case of the criminal law, in addition to the above, the right of the new sovereign to bring to trial and to punish persons subject to his jurisdiction at the date of the trial for acts committed before the change of sovereignty, which right is based upon the principle of sovereignty itself and on nothing else, is restricted by a general principle of law recognized by civilized nations: the principle *nulla poena sine lege*. By virtue of that principle the new sovereign ought not to bring such persons to trial unless the acts of which complaint is made were criminal acts both at the date of their commission and at the date of the trial. Nor should he inflict a penalty more severe than that to which the accused would have been liable under the law of the former sovereign in force at the date of the commission of the offence. The most important practical effect of this restriction is that the new sovereign cannot try to punish a person for offences committed against the former sovereign as such, in particular treason, for in these cases the requirement of double criminality is not met.

(*d*) International practice as manifested in international treaties and to a lesser extent in international arbitrations exhibits three main characteristics: (i) The first is that where, in exceptional cases, not merely a change of sovereignty but the actual creation of a new international personality is achieved by an international instrument, that instrument will usually provide specifically for the maintenance of the law previously existing in the territory in question, and usually subject to the condition *rebus sic stantibus*. The existence of such an international instrument is sufficient to take the matter out of the exception of domestic jurisdiction. (ii) The second typical feature of international treaties, followed also in international arbitrations, is that they proceed upon the assumption that the law in force in a given territory is the law of the territorial sovereign, even where most of the rights of sovereignty are temporarily suspended, for example, in consequence of belligerent occupation. Conversely, where the treaty provides for a given law, in its entirety or subject to certain limitations, to be in force in a given territory, that territory will be considered part of the territorial domain of the sovereign whose law is thus in force there. (iii) The third, and most important, characteristic is that in so far as international treaties are concerned with these matters, they normally deal with the practical and administrative consequences flowing from the change of sovereignty on such questions as the administration of justice. To this extent they, too, proceed on the tacit assumption that the change of sovereignty brings or may bring in its train a change in the substantive law applied in the territory affected, but that the matter is of no direct concern for international law.

IMMUNITY OF FOREIGN STATES: THE PRACTICE OF THE FRENCH COURTS

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THE object of the present article[1] is an account, by an English commentator, of the main body of the cases[2] decided in France on the question of the immunity of foreign states from the jurisdiction of the domestic tribunals. The author applies to the French decisions the method which he would use in analysing a series of cases decided by English courts. The validity of such a method may be questioned. The authority of precedents in each system is admittedly not the same. Case law has probably more influence over French courts than French commentators are sometimes willing to admit, and a detailed view of it may, for the comparative lawyer, be more useful than the doctrine of the standard manuals.[3]

1. *General Principles*

It will be helpful at the outset to analyse and distinguish some of the principles which are not always clearly distinguished in the cases. This applies particularly to the question of the nature of the immunity involved. On this matter the English[4] law is tolerably clear: in the simplest instance, the foreign state cannot be *impleaded* at all. The immunity, that is, attaches to the defendant as such by virtue of his quality or character and irrespective of the nature of his act. It is an immunity *ratione personae*, of the same kind as diplomatic immunity properly so called—which French law as much as English recognizes to be an immunity *ratione personae*. In English law the immunity attaching to a foreign state is to this extent the same as that which attaches either to the ambassador or to the foreign personal sovereign:[1] it is an unconditional immunity, in the sense that the court holds itself incapable of proceeding against such a defendant at all. The foreign state's immunity, in English law, extends farther: even if the foreign state is not impleaded, the court will not entertain an action which is directed against property belonging to, or in the 'possession or control' of, the foreign state—though as regards this extension there may be a question whether the immunity is unconditional (as is generally believed) or whether it depends from the property being 'public'—*publicis usibus destinata*.

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[1] *Note on citations.* The *Journal de Droit International* is here referred to as *Clunet.* The *Revue de droit international privé* which became the *Revue critique de droit international* is referred to as *Darras.* As regards French cases, the normal French method of citation is adopted: that is to say, the major reports when available (*Sirey, Dalloz Périodique,* and *Gazette du Palais*) are cited as S., D.P., and Gaz. Pal., followed by year, part, and page (e.g. S. 1938. 1. 117; D.P. 1939. 2. 63). D.H. and D.J. refer to *Dalloz, Hebdomadaire* or *Journal* in the relevant years. The case is identified by the date of its decision and the name of the court deciding it. The decisions of the Cour de Cassation are indicated as 'Cass.' followed by a reference to the relevant section of the court (req., civ., crim.). The name of a town by itself (e.g. Paris, Aix, Rouen) designates a court of Appeal. A tribunal of first instance is identified by the word 'Tribunal' (abbreviated as Trib.), followed by 'civ.' or 'comm.' (to indicate the civil or commercial court) and the name of the place or district: e.g. Trib. civ. Seine, Trib. comm. Marseille.

[2] Most of the then existing French cases are referred to by Miss E. W. Allen in Part II of her book *The Position of Foreign States before National Courts* (1933). She was a member of the Advisory Board on the Competence of Courts in regard to Foreign States, of the Research in International Law of the Harvard Law School. That body's report is published as a supplement to *American Journal of International Law,* 26 (1932), pp. 451–738. Some of the French cases are also considered in Fitzmaurice's interesting article in this *Year Book,* 14 (1933), p. 101, entitled 'State Immunity from Proceedings in Foreign Courts'.

[3] The writer is greatly indebted to those manuals and particularly to Niboyet's *Traité de droit international privé français* (1949), vol. 6, §§ 1758–92, which largely reproduces and brings up to date an article first published by Niboyet in 1936 (*Rev. gén. droit international public,* 43, p. 525). A useful summary statement is to be found in Batiffol's *Traité élémentaire de droit international privé* (1949), §§ 702–8. The writer has also greatly profited from Dr. Lipstein's note in *Annual Digest,* 1938–40, p. 240.

[4] See, e.g., *The Cristina,* [1938] A.C. 485.

It may be asked whether the French courts recognize, in the case of the foreign state, any unconditional immunity *ratione personae* at all. The answer is by no means simple. The problem neither was nor is framed in such terms.[2] It is, however, submitted that the classical French rule did in fact accord such unconditional immunity to the foreign state, and that no decided case of authority has frankly rejected the rule, which indeed was categorically reaffirmed by the Cour de Cassation in 1933.[3] But there has been a tendency to seek to limit the immunity, both by commentators and by some of the reasons adduced in some of the judgments.

One method of limiting the immunity, whilst still retaining it as an immunity *ratione personae*, was to attempt a distinction in the personality or character of the defendant. If the defendant could be regarded as having both a 'public' and a 'private' character, an immunity *ratione personae* could still be granted but limited to the 'public' character of the defendant. This method was discussed in the French courts with reference to *personal* sovereigns, to whom indeed the distinction is more appropriate. The discussion arose in part from a misunderstanding of the English case of *Duke of Brunswick* v. *King of Hanover*.[4] That case was highly peculiar in that the defendant, though a foreign sovereign, was also a subject of the Queen. *In the circumstances* (there being no unconditional personal immunity of the defendant), the Master of the Rolls was no doubt right both in granting an immunity and in limiting that immunity to acts done by the defendant in his public capacity as King of Hanover: but the elaborate judgment,[1] in spite of the express qualifications it contained, was interpreted as establishing a *general* distinction between the personal and public characters of foreign individual sovereigns generally. The authority of the English courts was accordingly cited as supporting the proposition that immunity was, in the case of individual foreign sovereigns, to be limited to acts done by them in their public capacity—a proposition which is of course directly contrary to the English law concerning such sovereigns.[2] In spite of that confusion, there is in fact no French[3] case which holds a foreign reigning sovereign liable to answer in the French courts for acts done by him in his personal capacity; but the reasons given in some of the judgments might seem to suggest that the court would be disposed so to hold if the case should arise—though it would be odd indeed if a tribunal should refuse to the sovereign himself the immunity which undoubtedly it accords to the sovereign's ambassador as his representative.

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[1] *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149 (C.A.).

[2] In a very recent article (1950 *Darras* 139) Niboyet suggests, as a matter of great novelty in this field, a distinction between an '*incompétence territoriale*' and an '*incompétence d'attribution*'. The '*incompétence*' he names '*territoriale*' derives from the '*qualité du défendeur*' and results in a true '*immunité de juridiction*'. It is in fact the immunity '*ratione personae*' known to English law. The '*incompétence d'attribution*', which is not readily explicable in terms familiar to English law, is discussed below (p. 296). Niboyet, as will be seen (*infra*, p. 298), desires to limit the foreign state's immunity to the second class exclusively.

[3] 23 January 1933, *Hanukiew* c. *Ministre de l'Afghanistan*, S. 1933. 1. 249 with a note by Rousseau. See *infra*, p. 299.

[4] (1844), 6 Beav. 1; 2 H.L.C. 1.

The confusions engendered by these discussions were accentuated by a parallel attempt to distinguish between the capacities of the *corporate* sovereign—the foreign state itself: the '*État puissance publique*' and the '*État personne privée*', a distinction similar[4] to that originating in Germany between the '*État fisc*' and the '*État Souverain*'. However, the Prussian Tribunal of Conflicts in the important decision *Von Hellfeld* c. *État russe*[5] emphatically refused to accept the distinction proposed by the German publicists. In France, so far as the foreign state was concerned, the matter is generally believed to have been settled by the categorical decision of the Court of Appeal of Paris in *Gamen-Humbert* c. *État russe*.[6] Ever since that decision the attempt to discover two or more personalities or capacities within a state has dwindled in importance, if it has not been abandoned, though the opposition '*puissance publique*'/'*personne privée*' has been repeated in a slightly different sense.

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[1] This judgment was known and cited in France—see, e.g., Descoutures' rapport in the *Caratier–Terrasson* case D.P. 1885. 1. 341 (Cass. civ., 5 May 1885), *infra*, p. 302.

[2] See *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149 (C.A.).

[3] The French cases dealing with personal sovereigns are *Héritiers de l'Empereur Maximilien* c. *Lemaistre* (Paris, 15 March 1872, S. 1872. 2. 68); *Isabella de Bourbon* c. *Mellerio* (Paris, 3 June 1872, S. 1872. 2. 293; D.P. 1872. 2. 124); the involved litigation concerning the arbitral sentence of Napoleon III delivered in 1856 in *Consorts Ben Aiad* c. *Gouvernement tunisien* (Algiers, 22 January 1914, 1919 *Darras* 494: for some of the previous trials see Paris, 14 December 1893, D.P. 1894. 2. 421, Cass. civ., 21 January 1896, D.P. 1897. 1. 305, with a note by Valéry); *Seyyid Ali* c. *Wiercinski* (Trib. civ. Seine, 25 July 1916, 1919 *Darras* 505). And see *Doucet* c. *Gouvernement ottoman et Lair-Dubrueilh* (Trib. civ. Seine, 12 December 1911, 1912 *Darras* 745, Gaz. Pal. 1912. 1. 234).

[4] See, e.g., Gombeaux, *Condition de l'État industriel et commerçant* (1904).

[5] 25 June 1910; commonly known in France as 'L'Affaire des fonds russes à Berlin' and reported *inter alia* in S. 1912. 4. 1, with a polemical note by de Lapradelle. This case held that the Russian state funds in Berlin were immune from *execution*, even though the Russian state had submitted to the *jurisdiction* of the German court.

[6] 30 April 1912, D.P. 1913. 2. 201, with a note by Gidel which has been frequently cited. See *infra*, p. 304.

These attempts, had they been successful, would have resulted in a limitation of the foreign state's immunity, but that immunity would nevertheless have continued in its limited range as an immunity *ratione personae*, of the sort known to the English law. Such an immunity should be contrasted with an immunity *ratione materiae*—one, that is, which arises from the nature of the act done. The two types of immunity are not indeed wholly separable—the nature of the act done may evidence the character or capacity in which the defendant is acting—but they depend from different conceptions and are best kept distinct, though it is understandable that courts and commentators should have intermingled them. An immunity *ratione materiae* (if it can properly be called an immunity at all) does not depend from a privilege of the defendant: it arises out of what may be termed an incompetence of the court.

The notion of the incompetence of a court by reason of the nature of the subject-matter of the dispute—which is comparatively little known in the English system—is very familiar to the French jurist. It is especially familiar to him in two contexts: the conflicts of jurisdiction arising between the French civil court and on the one hand the administrative, or on the other the commercial, tribunals. Since the person escaping in a particular instance the jurisdiction of the court may, though improperly, be supposed to have an immunity in respect of that court, it was all too easy for the French jurist to carry over, if only unconsciously, into the discussion of the foreign state's immunity *vis-à-vis* domestic tribunals the criteria used by the French system to determine the jurisdictions *inter se* of the French civil, administrative, and commercial courts. It certainly would not surprise a comparative lawyer if a rule of law which is accepted in apparently identical terms by two separate systems is found to suffer in each a considerable but ill-defined change as the result of the effect upon it of the differing institutions into which it is received. Indeed our prime question here may be formulated as follows: what, if any, has been the real effect in France of the internal French jurisdictional system, and of the rules of competence it has evolved, upon the supposedly international rule of law granting to a foreign state immunity from the municipal tribunal?

The rules of competence internally evolved in France are themselves complex and not easily defined. In the conflict between the civil and administrative tribunals one of the criteria used in the nineteenth century was that of *acte d'autorité* and *acte de gestion*: the *actes d'autorité* were within the competence of the administrative, and those *de gestion* of the civil, tribunal. This distinction, in the form either of acts *jure imperii* contrasted with those *jure gestionis* or *État puissance publique* with *État personne privée*, has certainly had influence upon the discussion of the foreign state's immunity, if only to bewilder the discussion; there is, at least, some echo of the distinction in the judgments of courts. Yet, it is submitted, no French case of any authority can be pointed to where the court has categorically accepted the distinction in the sense of holding a foreign state defendant liable before a French municipal tribunal upon the ground that the act, though done by that state, was an act done *jure gestionis*. At most, such a ground is offered as an additional make-weight reason for a decision more solidly based upon another principle. Moreover, the decided cases concerning the foreign state do not seem at all to tally with the distinction evolved to deal with the internal conflict of civil and administrative tribunals: in particular, transactions concerned with loans, transport, and the management of ships which, if done by French administrative authorities, would probably have been regarded as *actes de gestion* depriving them of administrative immunity, have been held not to deprive the foreign state of its international immunity. Finally, the nineteenth-century distinction between *acte d'autorité* and *acte de gestion* is now discredited in French internal law. To quote the most recent authority:[1]

> 'Cette distinction trop compliquée et incertaine a fini par être abandonnée par la jurisprudence au début du XX^{e} siècle. Dans de nombreux cas il était impossible de déterminer si l'on se trouvait en présence d'un acte d'autorité ou d'un acte de gestion. Mais si ce critère n'a plus qu'un intérêt historique et si, juridiquement, techniquement, il est insuffisant, il faut reconnaître qu'il était intellectuellement très séduisant. . . .'

Opinions may differ as to the intellectually seductive character of the distinction, but it seems tolerably certain that a French court is not likely to be actually seduced into accepting to-day, under the guise of the *jure imperii/jure gestionis* contrast, a distinction which has by experiment been found to be in France juridically unsatisfactory and technically impossible.

The more modern French method of distinguishing between the competence of civil and administrative tribunals,[2] at any rate as regards contracts,[3] is to regard neither the capacity of the actor nor the power under which he acts, but the manner and method of his action. An administrative authority may enter into a 'private law' contract with an individual: if it uses a *procédé de droit privé*, the civil courts will have jurisdiction. Again to quote Odent:[4]

> 'Le critérium est purement formel: on prend le contrat isolément et on l'interprète

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[1] R. Odent, *Contentieux Administratif* (Cours de Droit, Paris, 1950), pp. 76–77.

[2] We must leave out of account here the immense learning concerned with the *domaine privé* of administrative authorities, with acts affecting private property and personal liberty, and with the extreme complication of the theories of *emprise* and *voie de fait*.

[3] As regards torts, the civil tribunal in general has jurisdiction only if the public servant has committed a fault which not only is '*personnelle*' but also '*détachable du service*': a subject which again involves numerous very nice points of controversy.

[4] Op. cit., p. 105.

en cherchant quelles ont été les intentions des parties pour déterminer le droit qui lui est applicable et la compétence qui en découle.'

It should be observed that Odent finds it convenient[1] to treat as a separate category, 'illogique mais commode', the case of 'services publics industriels et commerciaux'. There is, in that case, a general tendency to attribute competence to the civil courts, though he judges that the distinctions made, at any rate as regards third parties, are 'd'un byzantinisme excessif'.[2]

This more modern method of distinguishing civil and administrative matters is paralleled, though inversely, by the method of distinguishing civil and commercial matters. What gives jurisdiction to the commercial court is the '*acte de commerce*'. No doubt the *commerçant* is a person who habitually performs *actes de commerce*, but we must look not to the character or capacity of the parties but to the nature of the specific transaction in question if we wish to determine whether a commercial court has jurisdiction. The notion of an '*acte de commerce*' is very familiar to a French jurist, though it may be a good deal less precise than he sometimes supposes. It would have been remarkable if such a notion, used as it is to determine jurisdiction and reinforced by a similar development on the administrative side, had not been called in aid to answer the question whether a French tribunal has jurisdiction in respect of the act of a foreign state. We would expect a tendency at least to suppose, even if the tendency were misguided or improper, that the French domestic tribunal has jurisdiction if the act is one which, when done by a French authority, falls *outside* the competence of the French administrative tribunal, more particularly if it falls *within* the competence of a commercial tribunal. And indeed in cases dealing with foreign states there is much reference to '*acte de commerce*' and '*procédé de droit privé*'.

It is supposed by some French commentators, outstanding amongst whom is Niboyet,[3] that the French courts in recent times, and particularly in the inter-war period, have categorically accepted these distinctions with reference also to the foreign state. In their view, the immunity of the foreign state now exists only in respect of certain kinds of acts. If this is true then the unconditional immunity which in England is granted to the foreign state *ratione personae* would in France have become a conditional exemption *ratione materiae*. In this article it is submitted, with all proper deference, that the situation is neither so simple nor so clear. It is indeed the case that French courts have in some instances refused immunity, particularly to the U.S.S.R., where an English court would probably have admitted it; but they appear not to have gone as far as the commentators nor to have accepted their reasons. The distinctions which the courts make are more subtle than those approved by the commentators and would, it is believed, be acceptable to the English courts also: they will be examined in due course. What is striking is the extent to which the French and English courts still agree. It may well still be true that the French courts recognize an unconditional immunity in the full sense of the word in the case of the foreign state as such. The question, however, is not, on any view, free from perplexity.

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[1] Op. cit., pp. 113–17.

[2] Ibid., p. 117. Even a common-law lawyer, inured to distinctions made in the doctrine of common employment, would be inclined to agree.

[3] Op. cit., § 1761: 'On peut donc affirmer que la jurisprudence française a rompu définitivement avec l'ancienne immunité généralisée des États, quelle que fût la cause de l'action . . . on pourrait désormais et nettement formuler [la jurisprudence] de la manière suivante: incompétence des tribunaux français à l'égard des États étrangers sauf lorsqu'il s'agit d'un acte de commerce.'

Niboyet's theory was cited with approval by Castets, the rapporteur in the *Affaire Vestwig* (Cass. req., 5 February 1946, S. 1947. 1. 137: below, p. 319). For a similar opinion, though expressed entirely *obiter*, see the *Officina del Aceite* case (Aix, 9 December 1938, D.P. 1939. 2. 70: below, p. 326). See also Weiss in *Rec. des Cours de l'Acad. de dr. internat.*, 1923, p. 536.

An indication of the perplexity may be found in the French rules dealing with the waiver (*renonciation*) of immunity.[1] It is established French law that if the civil tribunal is incompetent—e.g. if the matter is an administrative one—no agreement or submission of the parties can give it jurisdiction: the incompetence is '*d'ordre public*'. It might be supposed that if the foreign state's immunity was really due to the incompetence of the domestic tribunal, similarly the foreign state could not waive its immunity. But indubitably it can: the French cases go farther than the English and hold that an *agreement* to waive[2] is binding and sufficient, whereas the English courts require a submission *in facie curiae*.[3] The Court of Appeal of Paris has gone so far as to hold[4] that an appearance *en tierce opposition* amounts to a waiver, though this view has not been followed.[5] Yet the immunity is sufficiently '*d'ordre public*' for it to be the duty of the court to raise it '*d'office*'—e.g. upon the non-appearance of the defendant.[6] So much is it *d'ordre public* that the neglect of the immunity opens the way to the extreme and extraordinary process '*en annulation*'.[7] It would, however, seem on balance that the rules of waiver are more consistent with the view that the

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[1] We must leave aside cases concerning the waiver of a diplomatic immunity. They include the *Foureau de la Tour* case (Cass. civ., 19 January 1891, D.P. 1891. 1. 9, where occurs the famous phrase 'acceptation certaine et régulière'); *Prince* c. *Nazare Agha* (Cass. civ., 3 August 1921, 1921 *Darras* 504); *De Fallois* v. *Piatakoff* (Cass. crim., 26 February 1937, S. 1938. 1. 117); *de Zubiria* c. *de Z.* (Paris, 25 April 1907, 1907 *Darras* 550); *Dessus* c. *Ricoy* (Trib. civ. Seine, 23 March 1907, D.P. 1907. 2. 281, with Politis's well-known note); *Reichenback* v. *Ricoy* (Paris, 4 April 1906, 1907 *Darras* 553); *Cottenet* c. *Raffalowich* (Paris, 6 August 1908, 1909 *Darras* 175). These cases hold that the diplomatic immunity is '*d'ordre public*' and that its waiver is both limited and difficult.

[2] *Rochaid Dahdah* c. *Gouvernement tunisien* (Trib. civ. Seine, 10 April 1888, 1888 *Clunet* 670).

[3] *Duff Development Co. Ltd.* v. *Government of Kelantan*, [1924] A.C. 797.

[4] *Viel* c. *Crédit Lyonnais* (Paris, 2 April 1936, D.H. 1936. 303, 1936 *Darras* 787).

[5] *Rousse et Maber* c. *Banque d'Espagne* (Poitiers, 26 July 1937, D.P. 1937. 2. 89); *État espagnol* c. *Banco de Bilbao* (Rouen, 7 December 1937, S. 1938. 2. 23, but see note by Rousseau).

[6] *Lahalle et Levard* c. *The American Battle Monuments Commission* (Paris, 28 February 1936, 1937 *Darras* 484, with a note by Niboyet, *infra*, p. 325).

[7] *Hanukiew* c. *Ministre de l'Afghanistan* (Cass. req., 23 January 1933, S. 1933. 1. 249). For the nature of this process see *infra*, *Vestwig*'s case (Cass. req., 5 February 1946, S. 1947. 1. 137).

French courts treat the foreign state's immunity as one *ratione personae* which can be waived[1] rather than one arising from the tribunal's incompetence, which cannot be cured.

Indeed, so evidently can immunity be waived that the French law is embarrassed by the notion of 'tacit waiver'—which is wholly incompatible with the view that the foreign state's immunity derives from the tribunal's incompetence. 'Tacit waiver' is no doubt a subterfuge. It has not been accepted by any French court of authority: it has been mainly used by inferior courts to give an air of plausibility to the exercise by them of a jurisdiction which the superior courts have either rejected or based upon a more tangible ground. And when the tacit waiver is construed out of the private or commercial nature of the transaction, or out of the presence within the jurisdiction of the foreign state, it evidently becomes a mere figment inacceptable to any rational system. Still no doubt by this means also have some inferior French courts attempted to limit the effect of the foreign state's immunity.

Besides these usual categories, the French courts, as the comparative lawyer will be specially interested to note, seem to have drawn, in terms which evidently caused them some difficulty, a distinction very familiar to him in another system. The French courts have allowed suit against a foreign state, or against assets held or claimed by that state, when the state has appeared before the courts in what they have termed a 'representative' capacity—e.g. when the state was the 'légataire universel' of a testator or acted simply as a 'prête-nom'.[2] The English commentator would almost automatically regard a 'légataire universel' as an executor-beneficiary and the 'prête-nom' as a bare trustee. It is certainly easiest to classify these cases under the concept of a trust or something very akin thereto. When that is done, a good deal of their difficulty disappears. It is believed that the English court might well in such circumstances reach the same conclusions as the French courts; and it is instructive to observe the aid which the concepts of one system can bring to the analysis of the results of another.

2. *The classical rule of immunity*

The classical rule of the immunity of the foreign state was enunciated in the often cited judgment of the Cour de Cassation of 22 January

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[1] The effect of voluntary appearance cannot here be examined. The court may award costs (*Gouvernement espagnol* c. *Veuve Aguado*, Paris, 13 April 1867, D.P. 1867. 2. 49) and order security for them (*The Western Wave*, Trib. comm. Marseille, 11 January 1921, Gaz. Pal. 1921. 2. 112). As regards counterclaims, contrast *Gouvernement russe* c. *Simmonet*, &c. (Trib. civ. Brest, 3 June 1908, 1911 *Darras* 85) with *Letort* c. *Gouvernement ottoman* (Trib. civ. Seine, 31 April 1914, 1914 *Rev. Jur. Internat. loco. aér.* 142): the English practice would favour the Brest decision. *Quaere* the judgment of 27 June 1934 mentioned in *Socifros* c. *L'U.R.S.S.* (Aix, 23 November 1938, D.P. 1939. 2. 65). Submission to the jurisdiction is not submission to execution.

[2] See *infra*, pp. 318–20.

1849.[1] The facts were as follows: In 1837 Lambège and Pujol, merchants in France, sold to the Spanish Government a consignment of boots and received in payment a bill of exchange for 135,000 réaux drawn by the Principal Minister of the Spanish Military Treasury upon the Governor of the Province of Oviedo. Upon presentation on its due date the bill was dishonoured and duly protested. Some time later, in an entirely unconnected matter, the Spanish Minister of Finance obtained judgment from the French Tribunal of Bayonne against a certain Balasque. In February 1844 Casaux, the assignee in bankruptcy of Lambège and Pujol, obtained a *saisie-arrêt* upon the sums admittedly owed by Balasque to the Spanish Government, which *saisie-arrêt* was notified to the said Spanish Minister. The order was confirmed by the Tribunal and, upon appeal, by the Court of Pau. On further appeal by the Spanish Government, the Cour de Cassation quashed the judgment and stated in categorical terms that, from the universally recognized rule of the mutual independence of states,

> 'il résulte qu'un gouvernement ne peut être soumis, pour les engagements qu'il contracte, à la juridiction d'un État étranger; qu'en effet le droit de juridiction qui appartient à chaque gouvernement pour juger les différends nés à l'occasion des actes émanés de lui est un droit inhérent à son autorité souveraine, qu'un autre gouvernement ne saurait s'attribuer sans s'exposer à altérer leurs rapports respectifs'.

It is of interest to note that it had been argued for the respondent Casaux (*a*) that immunity was limited to the acts of a foreign state which were 'political' and done as a sovereign, and did not extend to its acts as a 'personne civile'; (*b*) that by contracting in France, as it had done, the Spanish Government had submitted to the jurisdiction of the French courts; and (*c*) that by analogy the Spanish Government should be as much subject to the French courts as was the French Government itself. The Cour de Cassation would have none of these arguments, which were supported, particularly as regards *saisies-arrêts*, by some text-book authority.[2]

Casaux's case has been very frequently cited and followed,[3] but it is sufficient for our purposes to go direct to *Hanukiew* v. *Ministre de l'Afghanistan*,[4] where the Cour de Cassation, nearly 100 years later and after the majority of the 'Soviet' cases, reaffirmed the principle of *Casaux*'s case in a most emphatic manner. The Tribunal Civil de la Seine had entered judgment by default in an action for damages which Hanukiew had brought against the state of Afghanistan in respect of a contract made in France for the supply of arms by him to that state. The ground of the Tribunal's judgment was that in the contract 'élection de domicile' had been made in Paris, and that this involved a submission by Afghanistan to the jurisdiction. No appeal was raised. The French Minister of Justice, using the extraordinary powers vested in him, brought the judgment before the Cour de Cassation by the very unusual process 'en annulation'.[1] The Court quashed the judgment out of hand, holding that there had been no submission to the jurisdiction and stating, in the most absolute terms, that

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[1] *Gouvernement espagnol* c. *Casaux*, S. 1849. 1. 81; D.P. 1849. 1. 5. And see the earlier cases there cited.

[2] Cited in respondent's argument and in S. 1849. 1. 81.

[3] It may be worth while recalling the remarkable case of *Ministère public* c. *Demoiselle Masset* (Paris, 23 August 1870, D.P. 1871. 2. 9) in which Mlle Masset ventured to sue, without success, the French Minister for Foreign Affairs and the Czar of Russia jointly 'à raison de saisies illégales, arrestations et vexations diverses qui auraient été commises à son égard par la police russe sur le territoire russe'.

[4] Cass. req., 23 January 1933, S. 1933. 1. 249, with a note by Rousseau. For similar cases see Trib. civ. Seine, 22 April 1890, *Faucon et Cie* v. *État grec* (1890 *Clunet*, 288)—though there the Court held that the Greek Government had acted 'en sa qualité de gouvernement et pour un service public'; and Nancy, 31 August 1871, *Luchmann and Cahn* v. *Heymann* (D.P. 1871. 2. 207)—a case concerning supplies for the German army.

> 'du principe de l'indépendance de l'État, il résulte qu'un gouvernement ne peut être soumis, pour les engagements qu'il a contractés, à la juridiction d'un État étranger'.

It should be noted that the Court found it unnecessary to direct its attention to the nature of the contract[2] which indeed it did not appear to consider as in any way relevant. The judgment is in its terms emphatic and absolute.

In the meantime, on 5 May 1885, the Cour de Cassation in *Veuve Caratier-Terrasson* v. *Direction générale des chemins de fer d'Alsace Lorraine*[3] extended the principle of *Casaux*'s case. In 1876 M. Terrasson obtained judgment in France against the respondents, who did not contest the jurisdiction, in respect of goods entrusted to them which they had lost. In 1880, the judgment debt remaining unsatisfied, the plaintiff made a *saisie-arrêt* (in this case properly to be translated as 'took garnishee proceedings') upon all the sums due to the respondents by a French company at Nancy. The *saisie-arrêt* was upheld by the Civil Tribunal of Nancy but quashed by the Nancy Court of Appeal. In affirming the decision of the Court of Appeal the Cour de Cassation held (*a*) that the 'Direction générale' was an 'administration publique' of the German state, (*b*) that the operation of the railway was therefore 'en réalité le fait de l'État lui-même' and that all its assets were the property of the German state, and (*c*) that execution could not issue against the property of the German state in France. The appellant had argued (as appears from the rapport of M. le cons. Descoustures)[4] in the alternative that the 'Direction générale' was an entity having a personality distinct from that of the German state, and that even if the personality was not distinct, the operation of the railway constituted 'un ensemble d'actes de commerce' which as an 'enterprise' (to use a more modern term) was justiciable by the municipal courts. It is believed that in the 1930's the

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[1] See *supra*, p. 299, and *infra*, p. 319.

[2] Niboyet (op. cit., p. 349) commenting upon the decision 'saves' it upon the ground that the transaction was not, in his sense, an *acte de commerce*. There seems in the case no warrant for this interpretation.

[3] D.P. 1885. 1. 341.

[4] *Ubi supra*: D.P. 1885. 1. 341.

Cour de Cassation, though continuing to proclaim the non-liability to execution of the assets of a foreign state, would have been willing to regard the railway assets as an entirety subject to execution, whether or not the 'Direction générale' had according to German law a distinct personality. The critical point upon which this judgment extends the *Casaux* case[1] is that the respondent was not the German state but an at least notionally separate entity: it was merely 'in effect' or 'in reality' that the assets were the assets of the German state.

It is as well established in French as it is in English law that execution cannot issue against a foreign state. This exemption is so evidently a part of the classical immunity that it does not need emphasis here. The doctrine was restated in emphatic terms in 1938 in the case of *Socifros* c. *L'U.R.S.S.*,[2] of which the facts were as follows. By a judgment of 27 June 1934 (unreported) of the Tribunal de Commerce de la Seine,[3] in an action originally brought by Azneft (which was, as alleged, a creature of the U.S.S.R.) against the firm of Socifros and in which Socifros counterclaimed, the U.S.S.R. as such was ordered to pay Socifros 5 million francs damages. The judgment remaining unsatisfied, on 4 February 1938 Socifros issued execution against the S.S. *Pokrovski*, the property of the U.S.S.R., then in Toulon harbour. The question of the validity of the arrest of the ship coming before the Tribunal Civil de Toulon, the Tribunal ordered its immediate, unconditional release, notwithstanding appeal. This order was confirmed by the Court of Appeal of Aix. The reasons given by the two Courts may be summarized as follows:

1. Whether or not the U.S.S.R. had submitted to the jurisdiction of the Seine Tribunal, it had not thereby waived its immunity from execution (both Courts).
2. Even if the Seine Tribunal had jurisdiction, execution of the judgment could not be levied against the goods of a foreign sovereign state, 'qu'ils appartiennent au domaine public ou au domaine privé'; (Court of Appeal of Aix: 'se basant sur insaisissabilité absolue dans tous les cas des biens appartenant à l'État').
3. Whether or not the S.S. *Pokrovski* was a 'navire de commerce, ce n'est pas la qualité juridique du navire qu'il faut prendre en considération mais celle du débiteur, or cette dernière ne permet pas la saisie' (Tribunal Civil de Toulon, citing Ripert, *Droit maritime*, § 980).

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[1] See *supra*, p. 301.

[2] Trib. civ. Toulon, 26 April 1938 (1939 *Darras* 303, with a note by Batiffol); on appeal: Aix, 23 November 1938 (D.P. 1939. 2. 65, with a note by Colliard).

[3] The Court of Appeal of Aix treated this judgment as a mere aberration. It probably is, but note that the foreign state or its representative had initiated proceedings. See *supra*, p. 300, n. 1.

4. Whatever may be the limits, if any, to immunity from jurisdiction, the immunity from execution is absolute (both Courts).[1]

There were no doubt from early times mutterings[2] against the principle of immunity established in *Casaux*'s case, which was disliked by the publicists. As has been noted,[3] an attempt was made to limit its effect, in the case of personal sovereigns, by distinguishing between their public and their private capacity. A similar attempted distinction, in the *simplest* form of *État puissance publique* and *État personne privée*, was rejected by the Court of Appeal of Paris in *Gamen-Humbert* c. *État russe*,[4] a judgment which by common consent had and, it is submitted, has, very great authority.[5] The facts of the case were as follows:

Some railway carriages had been put on show at the Paris Exhibition of 1900 by a Russian Railway Company. After the Exhibition, while the carriages were being transported through Paris by a certain Portefaix, with whom the company had contracted for the transport, one of them collided with a lamp-post, which collapsed and injured the appellant. The appellant sued in Paris both Portefaix and the company and recovered judgment against both. The judgment remaining unsatisfied, in this action the appellant issued a writ in France asking for a declaration that the Russian state was jointly liable, upon the ground that the company was the property of the Russian state.

The Court of Appeal of Paris, affirming the judgment of the Tribunal de la Seine, dismissed the action. For the purposes of argument it accepted the contention that the railway was the property of the Russian state. It distinguished between the decision of a foreign state to take part officially in an exhibition—which it described as 'un acte de gouvernement[6] ne pouvant jamais donner lieu à une responsabilité civile'—and arrangements made by the state with sub-contractors for the performance of the necessary work, which it described as

> 'simples actes de gestion . . . dépourvus de tout rapport direct avec l'exercice du pouvoir social et susceptible de l'engager civilement vis-à-vis de tout intéressé national ou étranger'.

That is to say, the Court seems to have accepted the view that if a French administrative authority had made with Portefaix the contract which the Russian Railway Company made, the French administrative authority would have been subject to the jurisdiction of the civil courts in respect of Portefaix's default. Nevertheless it held, even in respect of such acts, that a foreign state is not subject to the jurisdiction of the municipal courts:[1] it was impossible, in the case of foreign states, to distinguish

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[1] For similar emphatic expressions by the same Court of Appeal of Aix see its judgment of 9 December 1938, in *Officina del Aceite* v. *Domenech*, reported with the *Socifros* case in D.P. 1939. 2. 65: see *infra*. And see Rouen, 7 December 1937, *État espagnol et Banque d'Espagne* v. *Banco de Bilbao and Others*, S. 1938. 2. 23, *infra*, p. 317.

[2] See, e.g., Royer in D.P. 1867. 2. 49.

[3] *Supra*, p. 294.

[4] Paris, 30 April 1912, D.P. 1913. 2. 201, with an important note by Gidel.

[5] It was no doubt inspired by the decision of the Prussian Tribunal of Conflicts in *von Hellfeld* c. *État russe* of 25 June 1910; see *supra*, p. 295.

[6] This is another technical term in the then French administrative law, signifying an act into which even the administrative tribunal would not inquire.

> 'la personnalité publique qui échapperait à la compétence étrangère de la personnalité morale qui s'y trouverait, au contraire assujettie: tous les actes d'un État ne pouvant avoir qu'un but et qu'une fin toujours politique et son unité résistant à ce dédoublement'.

Attention must be drawn to the fact that what the Paris court refused to do was to give judgment against the Russian *state*: judgment against the state *Railway Company* had already been obtained.

But though the Court thus categorically rejects the suggestion that it is possible to distinguish the personality or capacity of a state, we shall again and again meet the phrases *actes d'autorité* and *actes de gestion* in all their various forms, though we may perhaps observe some shift in their emphasis. Our attention seems to be directed more to the nature of the act than to the character or capacity of the actor. It looks as if there may be some doubt about the foreign state's immunity when the act in question can be described as an '*acte de gestion*', though the immunity of the foreign state as such is well established. At any rate, when holding themselves *incompetent*, the French courts are very willing to add, if possible, that in the particular instance the foreign state had acted as a 'puissance publique'. Indeed, after the 1914 war there is perhaps in such circumstances a tendency to hold, negatively, that the act in question is *not* an '*acte de commerce*'.

Since the main protagonist[2] of the doctrine that the foreign state enjoys in France a very limited immunity founds his opinion upon this notion of '*acte de commerce*', we turn now to its examination.

3. *Acte de commerce*

Though 'acte de commerce' is no doubt closely linked to 'acte de gestion' and 'procédé de droit privé', it directs the attention of a French jurist to a different branch of his law. 'Acte de gestion' was for him concerned with the respective competence of the administrative and civil courts, whereas 'acte de commerce' is the criterion distinguishing the competence of the civil from that of the commercial tribunal. Indeed, he may be willing[3] to prefer 'acte de commerce' precisely because he feels that 'avec elle on se trouve sur un terrain relativement solide et connu'.

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[1] For an emphatic restatement of this doctrine see the decision of the Tribunal civil de la Seine of 1 April 1925 in *Esnault-Pelterie* v. *A. V. Roe Co., Ltd.*: 1925 *Clunet*, 702, 703.

[2] Niboyet, op. cit.: see quotation *supra* at note 3, p. 298.

[3] As is Niboyet, op. cit., p. 350.

It is relevant to note that for a common-law lawyer the notion, so far from being familiar, is unknown and, strictly speaking, meaningless: no such division is accepted in his system. 'Commercial court' has for him a significance quite different from that of 'tribunal de commerce' for a French jurist: the common law does not determine jurisdictions by reference to commercial acts. But it may also be doubted whether the test 'acte de commerce' is even for the French courts as solid as a French commentator may suppose. He may appear to mean by the test that a foreign state is subject to the municipal tribunal if it does an act which, if done by a person who is not a foreign state, would subject that person to the 'tribunal de commerce'. In this connotation the test would appear to be incorrect. For surely the floating of a loan for the purpose, say, of constructing a fleet of merchant ships, must be regarded as an 'acte de commerce'. Yet it has been repeatedly held by French courts that a foreign state raising a loan in France is not subject to the French municipal courts, without reference to the purpose of the loan. The raising of a loan is in itself an 'acte politique' and an 'acte de souveraineté'.[1] And even the guarantee given by a state of a loan issued by a railway company is not for these purposes an 'acte de commerce': the state can still claim immunity in respect of that guarantee.[2] It is evident that 'acte de commerce' is used in a peculiar and changeling sense when used with reference to a supposed exception to the rule of state immunity. To take a further example: the buying of arms by a state has been held[3] to be an 'acte de puissance publique'. But the buying of arms by a middleman for the purpose of re-sale is quite certainly an 'acte de commerce'. Are we to believe that a French court will take it upon itself to inquire into the purpose for which a foreign state buys arms and, if satisfied that the arms were bought for the purpose of re-sale, will it hold that there is an 'acte de commerce' subjecting the foreign state to its jurisdiction?

It is not contended that 'acte de commerce' is meaningless when used in this connexion—that would be a rash contention in view of the number of distinguished commentators, and courts, who have made use of the term.[4] It is submitted that in our context the term is a great deal less precise than we are sometimes led to suppose. It is in truth no more than an equivalent of 'acte de gestion' and suffers from all the difficulties from which that term suffers. It does no more than hint, in a vague and undefined manner, at some limit to the rule of state immunity, and leaves us in the dark as to the nature of that limit, if it exists at all.

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[1] See, e.g., *Gouvernement impérial du Maroc et Maspéro* c. *Laurans*: Aix, 30 December 1929, D.P. 1932. 2. 153, 156; Cass. req., 20 November 1934, S. 1935. 1. 103. And see the valuable and much-cited note by Pic in D.P. 1932. 2. 153. Pic took the view that, in 1932 at any rate, the French courts still maintained their classical rule of immunity. On loans and agents see *infra*, p. 328.

[2] See *Huttinger* v. *Société des Chemins de fer du Congo*: Trib. civ. Seine, 14 November 1934, 1937 *Darras* 186. And see the *Cavour Canal* case—in which the Italian Government was involved—Trib. comm. Seine, 11 April 1867, D.P. 1867. 2. 49, note.

[3] See, e.g., *Hanukiew* v. *Ministre de l'Afghanistan*, *supra*, p. 301.

[4] A similar distinction was proposed by the Brussels Convention of 10 April 1926 as regards merchant shipping operated by governments. This Convention is sometimes referred to by the French courts although France has not ratified her signature to the Convention.

Of the cases which are supposed to have canonized the 'acte de commerce' distinction the two which are often regarded as initiating the process are *The Hungerford* (*Seabrook* c. *Société Maritime Auxiliaire de Transports*),[1] decided by the Court of Appeal of Rennes on 19 March 1919, and *Lakhowsky* c. *Office Suisse des Transports Extérieurs*,[1] decided by the Court of Appeal of Paris on 16 March 1921. In both, the Courts of Appeal concluded *in favour of immunity*;[2] it is only their manner of reasoning which may appear to give some support to the doctrine of 'acte de commerce'.

The S.S. *Hungerford* (Captain, Seabrook) was the former German ship *Lauterfel* seized by and belonging to the British Admiralty who had put it into the hands of the firm of Hays & Son, of Belfast. On 17 June 1917, on a voyage from Australia whilst carrying wheat for the account of the French Government and wool for the account of the British Government, the vessel was involved in a collision with the S.S. *Angers*, the property of the respondents. On its arrival at Nantes, to prevent any attempt at arrest, the British Admiralty agreed to deposit a sum of 100,000 francs in lieu of bail. In this action before the Commercial Tribunal of Nantes the respondents sued Captain Seabrook for damages in respect of the collision. Upon a plea of immunity being raised, the Tribunal held itself competent upon the ground that the *Hungerford* was in private hands and no 'acte de puissance publique' on the part of the British Government was involved. From this decision appeal was brought to the Court of Appeal of Rennes, which reversed the judgment of the inferior court. It found, *inter alia*, that the furnishing of a deposit did not amount to a submission to the jurisdiction. It found further that Hays & Son

> 'ne sont ni les affréteurs ni les armateurs du navire Hungerford mais des gérants . . . les mandataires du gouvernement anglais qui est le propriétaire et le véritable armateur du navire'.

But having so found, it nevertheless went on to hold that the ship

> 'était utilisé non dans un but commercial et d'intérêt privé, mais dans un but d'intérêt politique, pour les besoins de la défense nationale, en dehors de toute idée de lucre et de spéculation'—

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[1] 1922 *Darras* 743, 745.

[2] Immediately subsequent to *The Hungerford* it was held, in *The Campos* (Trib. comm. Havre, 9 May 1919, *Clunet*, 1919, 747) that a ship the property of the Brazilian Government could not be arrested even if operated by a commercial company and even in respect of a commercial debt; and similarly in the case of a ship belonging to the United States—*The Englewood*: Trib. civ. Bordeaux, 17 April 1920 (1921 *Darras* 74). These decisions were followed in *Étienne* v. *Gouvernement des Pays Bas*: *The Ittersum*, Trib. comm. La Rochelle, 31 October 1947 (1948 *Darras* 118, with a note by Francescakis)—concerning a ship sailing to Canada for wheat for Holland. For the United States Shipping Board cases see *infra*, pp. 324, 325.

as if it were material so to hold; and so holding the Court of Appeal seemed in some measure to accept the principle upon which the Commercial Tribunal had acted, namely, that if the adventure was a commercial adventure (as the Tribunal affirmed and the Court of Appeal denied), the French courts would have been competent.

In the *Lakhowsky*[1] case the Court of Appeal of Paris is supposed to have gone further in the tacit acceptance of such a principle. The plaintiff had entered into a contract at Berne with the Office Suisse des Transports Extérieurs by which he undertook to provide shipping space for the transport of cocoa from Java, Rangoon, &c., to the order of the O.S.T.E. In this action he sued the O.S.T.E. for damages for repudiation of the said contract, the writ being issued against a Colonel Reynier, the representative of the O.S.T.E. in Paris. The plaintiff also claimed a declaration that the Swiss Government was jointly liable in respect of any damages which the Tribunal might award against the O.S.T.E. Though it dismissed the action for other reasons, the Tribunal commercial de la Seine rejected the O.S.T.E.'s claim to immunity upon the ground that immunity was limited to 'actes ayant le caractère de souveraineté ou actes administratifs, actes de la puissance publique', whereas the contract in question was not a contract concluded by the Swiss Government 'agissant de jure imperii pour la sauvegarde ou les intérêts de l'État mais au contraire un contrat essentiellement commercial conclu de jure gestionis'. Reversing the Tribunal upon this point, the Court of Appeal said:

> 'Considérant néanmoins que le tribunal a écarté l'exception [d'incompétence] en jugeant que la convention qui forme l'objet du litige constituerait non un acte politique dérivé de la puissance souveraine mais une opération de commerce accomplie par l'État suisse comme acte de gestion; qu'en tenant pour exact le fondement juridique de cette distinction[2] il est impossible d'admettre l'appréciation par laquelle les premiers juges l'ont appliquée aux faits du procès; que les accords prétendus sur lesquels porte le débat n'avaient pas un but commercial mais tendaient à assurer pendant la guerre européenne le ravitaillement de la nation suisse, qu'ils répondaient à des préoccupations d'intérêt international et de politique intérieure excluant toute recherche de bénéfices et toute idée de spéculation . . . que la juridiction française a, dans de telles conditions, le devoir de se déclarer incompétente.'

It is a nice question in this case whether the Court of Appeal entered upon a consideration of the facts because it agreed that it was necessary to do so or because, without deciding on a question of law, it found it easier to determine the question of fact. It may, however, be fair to say that in 1921 the Court of Appeal of Paris was not prepared to hold categorically that a foreign state enjoyed immunity even in respect of an 'acte de commerce' pure and simple. In this judgment the Court also held that the O.S.T.E.

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[1] *Supra*, p. 307.

[2] *Quaere* the correct translation of this phrase. Does it mean '*whilst agreeing* that this distinction is warranted and well founded in law' or simply '*assuming* . . .'?

'n'a pas la personnalité juridique et n'est qu'un service dépendant officiellement du "Département politique" '—a matter to which further reference is made later.[1]

4. *The Soviet cases*[2]

The protagonists of the 'acte de commerce' theory regard these cases as introductory merely: the doctrine, in their view, is clinched by the decisions of the highest courts concerning the liability of the Trade Delegation of the Union of Soviet Socialist Republics (la représentation commerciale en France de l'U.R.S.S.). The status of this Delegation was fixed in France by the Franco-Russian Commercial Treaty of 11 January 1934, which, having been continued from year to year, lapsed on 31 December 1939. After the Second World War a new Treaty, much more explicit in terms, was made and is now in force.[3] The cases under discussion, however, make in general little reference to the treaty terms: it is because they deal with what may be called the international common law (as seen by the French courts) that they are of importance.

The first and perhaps the most important of these cases is that reported as *U.S.S.R.* c. *Association France-Export*,[4] a judgment of the Cour de Cassation (Chambre des Requêtes) of 19 February 1929. It is important to note that although the U.S.S.R. appeared as appellant, the proceedings were actually taken against a Russian 'trust' named Gostorg and the Russian Trade Delegation in Paris. The judgment purported to have, and had, effect only against those parties.[5] The facts were as follows. As a result of negotiations conducted by the Trade Delegation and confirmed by the Soviet Commissar for External Trade, the respondent Association accepted Gostorg's offer to take a lease of the central stand at the Moscow Agricultural Exhibition for the purpose of staging a permanent exhibition of specimens of French industrial production. The parties subsequently falling out, the Association obtained *ex parte* an order from the President of the Tribunal civil de la Seine authorizing it to make a *saisie-arrêt conservatoire* to the amount of 8 million francs (being damages claimed for breach of contract) 'sur la société le Gostorg et sur la représentation commerciale en France de l'U.R.S.S.' The President having rejected the motion of Gostorg and the U.S.S.R. (which appeared in lieu of the Trade Delegation) to set aside this order, they appealed. The Paris Court of Appeal, though reducing the amount of the Association's claim to 650,000 francs, confirmed the *saisie-arrêt* up to that sum.

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[1] See *infra*, pp. 320, 325.

[2] On the position of the U.S.S.R. generally see Stoupnitzky, *Statut international de l'U.R.S.S., État commerçant* (1936). The case of *État roumain* c. *Pascalet* (Trib. comm. Marseille, 12 February 1924, D.H. 1924, 260; 1925 *Clunet* 113) is cited, but more by foreign than by French commentators, as authority for the acceptance by the courts of the 'acte de commerce' doctrine. This case is the decision of a commercial tribunal, and *en référé* at that. It has in France about as much authority as in England the decision of a bench of lay magistrates would have. Indeed it is so odd a case that even Niboyet, the protagonist of the 'acte de commerce' doctrine, suggests (op. cit. p. 346) that there must have been special (unreported) circumstances to warrant so aberrant a decision.

[3] For the text of the Treaty see 1947 *Darras* 468.

[4] S. 1930. 1. 49, with a note by Niboyet; D.P. 1929. 1. 73, with a valuable note by Savatier. The judgment of the Court of Appeal of Paris of 19 November 1926, from which the appeal was brought, is reported separately in D.H. 1927. 56 and is also to be found in *Sirey*, loc. cit.

[5] The judgment is on this point critically misstated by Niboyet (op. cit., p. 347), although he subsequently sets out the actual *arrêt*.

No argument was addressed to the Court in respect of Gostorg, for Gostorg evidently had by Soviet law a juridical personality distinct from that of the Soviet state. As regards the Trade Delegation it was strenuously argued that by Soviet law all external trade had become a state monopoly, that the Trade Delegation was indubitably by that law a governmental organization, and that this was further evidenced by the fact that abroad the Trade Delegation was attached to the official Soviet Embassy or Legation, and that therefore, as the Court summed up the argument:

> 'les saisies-arrêts faites contre sa représentation commerciale à Paris ont été, en réalité, pratiquées contre elle-même [l'U.R.S.S.] — c'est à dire, contre un état souverain à l'occasion d'un acte de sa personne publique, et qu'elles ne peuvent être maintenues'.

The Court answered this argument ambiguously. It held that 'la situation juridique de la représentation commerciale en France de l'U.R.S.S. n'est pas encore nettement définie'—it was, indeed, the subject of discussion at the Franco-Soviet Conference then sitting in Paris—

> 'que jusqu'à ce qu'il ait été décidé autrement par un accord diplomatique, les manifestations d'une activité commerciale qui s'exerce dans tous les domaines ne peuvent apparaître que comme des actes de commerce auxquels le principe de la souveraineté des États demeure complètement étranger'.

Though the answer is ambiguous, it seems tolerably clear that the Court refused to accept as binding upon itself the fact that according to Soviet law the Trade Delegation was a state organization, and whilst not going so far as expressly to hold that it had a separate and distinct juridical personality, the Court was not willing, in view of the Delegation's exclusively commercial activities, to extend to it the immunity of the state, but felt able to subject it as a delegation to the process of the Court.[1]

The Cour de Cassation rejected the Soviet Union's appeal against this decision. Its reasons are, it is submitted, absolutely unambiguous. To the argument that the Court of Appeal had held 'qu'une saisie-arrêt pourrait porter sur les fonds appartenant à un État étranger' it replied categorically that, in fact, 'la saisie-arrêt contestée a été pratiquée *sur la représentation commerciale en France* de l'U.R.S.S.'; then, turning to consider the nature of this entity, the Trade Delegation, it went on to hold

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[1] Immediately after this decision the Tribunal commercial de la Seine ordered that the name of the Russian Trade Delegation be entered upon the *Registre du Commerce* (13 January 1927: Gaz. Pal. 1927. 1. 359).

> 'que l'arrêt constate que *cette représentation commerciale* manifeste son activité commerciale dans tous les domaines; que *ces manifestations* ne peuvent apparaître que comme des actes de commerce auxquels le principe de la souveraineté de l'État demeure complètement étranger; que *cette appréciation de la situation juridique de la partie saisie* justifie le maintien de la saisie-arrêt'.

Then adverting to the argument that the Court below had wrongly appreciated the 'situation juridique' of the Trade Delegation because they had neglected or misconstrued the Soviet law, the Cour de Cassation turns away from this difficulty—to which we shall have to give consideration later—by holding (as would an English court) that foreign law is a question of fact and that even if the Judges had made a mistake in the view they took of the relevance or effect of the Soviet law, that is an error merely of fact which in France is not sufficient to found a 'pourvoi en cassation'.

It is tolerably clear, at any rate by English canons of construction, that the Cour de Cassation held, and held only, that upon the view taken by the Paris Court of Appeal of the *situation juridique* of the Russian Trade Delegation, it was permissible to issue a *saisie-arrêt* against the assets of that *Delegation*. But it does at least suggest that a court of appeal, when confronted with a body strange to international law as such, and one, moreover, which indulges exclusively in purely commercial transactions, may be entitled to hold that that body constitutes an entity outside the protection granted by international law to the state and to the state's normally recognized state organs. It may do this, moreover, without troubling unduly to consider whether the national law of that body does or does not endow that entity with a corporate personality distinct from that of the state. No doubt this involves some hypostatization of the Trade Delegation into an entity which can be subjected to legal process. But French law, having a more flexible and more realistic view of associations than English law, has no great difficulty in finding such entities—compare, for instance, its doctrine[1] concerning 'succursales ou agences d'une personne morale'—and could hold that the Trade Delegation was sufficiently such an entity to warrant a process of *saisie-arrêt* if it was, in fact, able to operate a banking account in its own name. The French courts endowed the Russian Trade Delegation with what, in another context, Savatier[2] describes as 'une sorte de demi-personnalité de fait'. The question remains[1] when and in what circumstances such a view of a particular body should be taken in order to exclude it from the immunity accorded to states. It should, however, be repeated that in the case here considered process was not issued by the French Court against a sovereign state, the U.S.S.R.; it was only because a rather special, but by no means unprecedented, view of the nature of the Trade Delegation was taken that process was permitted to be issued *against that Delegation.*

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[1] For a perhaps extreme example of this doctrine see the decision of the Court of Appeal of Poitiers of 26 July 1937, in *Rousse et Maber* c. *Banque d'Espagne et Autres*, D.P. 1937. 2. 89, with a note by Savatier. In this case the Saint Sebastian branch of the Bank of Spain was allowed to maintain an action against the Bank of Spain itself. See Savatier's discussion, and compare Brigallier, *Les Succursales des établissements commerciaux.*

[2] The view here maintained agrees in substance with Savatier's note on this case in D.P. 1929. 1. 73.

The 'betwixt and between' status given to the Trade Delegation produced immediately some interesting and curious results well illustrated by three cases,[2] namely, *Représentation Commerciale de l'U.R.S.S.* c. *S.A. des Entreprises Gère et Banque Commerciale pour l'Europe du Nord* and *Magasins Universels de la R.S.F.S.R.* c. *Khan*, decided by the Tribunal civil de la Seine on 7 January 1930 and 10 February 1931, respectively, and *Banque Arnus*, &c., c. *Représentation Commerciale de l'U.R.S.S.*, &c., decided by the Tribunal commercial de la Seine on 16 March 1931.

The Gère Company had made a contract 'par l'entremise de la Représentation Commerciale de l'U.R.S.S.' with a Soviet 'société', Rudmetalltorg, for the purchase of 15,000 tons of metal sheets. Rudmetalltorg having defaulted, the Gère Company recovered judgment against it in the French courts for damages for breach of contract, and now obtained *ex parte* a *saisie-arrêt* against the assets of the Trade Delegation to the amount of the debt owed by Rudmetalltorg. A motion by the Delegation to quash the *saisie-arrêt* was by this judgment rejected. The President of the Court examined the Soviet law relative to the constitution of Rudmetalltorg. He found that 'malgré son apparente constitution de société anonyme selon les règles communément admises, [Rudmetalltorg] ne jouit pas d'une autonomie réelle'; he held that in the 1925 contract between Gère and Rudmetalltorg the Trade Delegation had acted as a principal, for it had acted 'non pas en tant que simple mandataire d'une société russe mais comme partie directement intéressée agissant personnellement avec des pouvoirs propres de représentation d'une société sous sa dépendance'; and he confirmed the *saisie-arrêt* against the Trade Delegation. That is to say, the Court examined Soviet law for the purpose of extending the liabilities of the Trade Delegation, though such an examination had been rejected for the purpose of determining whether or not the Trade Delegation was a governmental organization.

In the *Kahn* case Kahn obtained a *saisie-arrêt* against the Trade Delegation and the Magasins Universels in respect of a debt due to him by the

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[1] See *infra*, pp. 320–30.

[2] Reported together in 1931 *Clunet* 412–17, with an interesting note by Tager. The case of *Chaliapine* v. *Représentation Commerciale de l'U.R.S.S. et Société Brenner*, also there reported, which subsequently went to the Cour de Cassation, is reserved for discussion later: see *infra*, p. 314.

Magasins Universels. The latter objected that they had not been properly served with notice of the *saisie-arrêt*, such notice having been served upon the Trade Delegation in Paris. The Court rejected this contention, holding that

> 'la représentation commerciale de l'U.R.S.S. en France représente obligatoirement, aux termes de la législation soviétique, les sujets et les sociétés russes qui font du commerce à l'étranger'.

The facts of the *Banque Arnus* case are not clear; but in an action for damages for repudiation by the Syndicat du Naphte de l'U.R.S.S. of a contract concluded between it and the Banque Arnus and countersigned by the Trade Delegation, it was held that the Trade Delegation was, in spite of a term in the contract seeming to exonerate it, jointly liable with the Syndicat. After an examination of Soviet law, the Court held that

> 'le Syndicat du Naphte ne saurait être considéré que comme un rouage de la Représentation Commerciale de l'U.R.S.S. qui n'est elle-même que l'organe commerciale[1] du monopole exercé par l'État soviétique commerçant'.

Thus the Trade Delegation got the worst of both worlds: it was sufficiently a separate entity to be distinguished from the Soviet state; it was not sufficiently a separate entity to distinguish itself from other commercial entities of that state.

Similarly, in *Société Téfimo* v. *Représentation Commerciale de l'U.R.S.S.*,[2] decided by the Court of Appeal of Paris on 17 May 1934, it was held that the Trade Delegation was liable in an action for damages for breach of contract (although it was found that no breach had actually been committed) brought by the plaintiff Company which had on 5 June 1928 contracted in Paris with 'le théâtre académique juif de Moscou', an institution nationalized by Soviet decree. The judgment ran, in part:

> 'Qu'on doit en conclure que le théâtre académique juif de Moscou est un organisme de l'État et qu'à l'occasion des transactions commerciales auxquelles il se livre à l'étranger il engage la responsabilité commerciale de l'État russe qui y monopolise le commerce par intermédiaire de ses représentations commerciales, que l'action intentée par la Société Téfimo contre la représentation commerciale de l'U.R.S.S. procède donc bien . . . .'

This line of cases may be treated as culminating in the decision of the Tribunal Civil de la Seine of 12 January 1940 in *Représentation Commerciale de l'U.R.S.S.* v. *Société française Industrielle et Commerciale des Pétroles* (*Groupe Malopolska*).[3] The respondent Malopolska Company was held by the Court to be the owner (through divers subsidiary companies) of oil wells and factories in Poland. In September 1939 the U.S.S.R. entered into and occupied the relevant parts of Poland and, as the Court found, it was admitted that 'les organisations commerciales soviétiques ont appréhendé les actifs de la Malopolska et les exploitent'. Malopolska obtained *ex parte* an order authorizing it to levy a *saisie-arrêt conservatoire* against the assets of the Russian Trade Delegation in Paris for a sum of 75 million francs as damages resulting from the said seizure. The Court rejected a motion to set aside the order, holding first that it could not be maintained that the action of the U.S.S.R. in Poland, outside the territory of the U.S.S.R., constituted 'des actes de gouvernement[1] accomplis par l'État soviétique en vertu de sa souveraineté'; that Malopolska had been 'spoliée de ses biens par l'organisation commerciale soviétique'; that 'la Représentation commerciale de l'U.R.S.S. est un des organismes de l'organisation commerciale soviétique'; and that this

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[1] It may be noted that in *Baitin* v. *Représentation Commerciale de l'U.R.S.S.* (15 November 1930: 1931 *Clunet* 418) the Tribunal Civil de la Seine had stated that the Soviet Trade Delegation was 'en état actuel une organisation sui generis'.

[2] 1934 *Clunet* 633.

[3] D.H. 1940. 68; 1947 *Darras* 157.

> 'Représentation *étant un organisme qui possède une existence et une individualité propre*, est justiciable des tribunaux français comme tout étranger contre lequel peuvent être prises des mesures d'exécution'.

This express holding that the Trade Delegation has a separate and individual existence is, it is submitted, the proper conclusion to be drawn from the cases cited above, though again the Delegation gets the worst of both worlds.[2]

Chaliapine v. *Représentation Commerciale de l'U.R.S.S. et Société Brenner*[3] is more difficult and requires closer attention. In 1927 copies of a pirated edition of Chaliapine's autobiography were sold in Paris by the second defendant, the Brenner Company, who were booksellers. Brenner had obtained these copies direct—i.e. not by means of negotiations with the Trade Delegation in Paris—from the Soviet state-monopoly book organization, the Mejdgounarodnaja Kniga ('The International Book'), which in Moscow dealt with all imports and exports of books. The pirated edition had been printed in Russia by the firm of Priboi. The Court found that the firm of Priboi was 'un éditeur de l'État russe' and that the publication was one 'sortant des presses de l'État et destinée à la Librairie Internationale'. In this action Chaliapine sued *the Trade Delegation* and the Librairie Brenner for damages in respect of the sale of the pirated copies in Paris. The Tribunal de Commerce de la Seine, holding that it was competent and that the negligence of the Société Brenner was only slight, awarded the plaintiff 10,000 francs damages against the first defendant and 1 franc damages against both defendants jointly. This judgment was affirmed by the Court of Appeal of Paris. The judgment of the Paris Court of Appeal —and especially its order (*le dispositif*)[1]—is of a wholly admirable precision. The order runs in part as follows:

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[1] See *supra*, p. 304.

[2] Though the French courts in this manner assumed jurisdiction over the Trade Delegation, they refused to adjudicate upon administrative matters which they regarded as the Delegation's internal business. Thus they dismissed actions for breach of contract of service brought against the Delegation by Russian subjects, its servants: see the cases of *Baitin* (chef de section), *supra*, p. 313; and *Sakharoff* (engineer): Paris, 30 November 1933, 1936 *Darras* 175.

[3] Paris, 28 July 1932, D.P. 1934. 2. 139, with a note by Lepointe; Cass. req., 15 December 1936, D.P. 1937. 1. 63; S. 1937. 1. 104.

> '. . . dit que des exemplaires de l'ouvrage de Chaliapine dénommé Pages de ma Vie . . . ont été contrefaits en Russie par un organisme de l'État russe chargé de l'exportation commerciale des livres;
>
> dit que la *Représentation Commerciale* de l'U.R.S.S. établie à Paris, qui représente cet organisme, est responsable du préjudice résultant de ses agissements en ce qui concerne les ouvrages introduits en France . . . ;
>
> dit que la *Représentation commerciale* de l'U.R.S.S. en France a été valablement assignée devant le tribunal de commerce de la Seine;
>
> dit que dans l'espèce la *Représentation Commerciale* de l'U.R.S.S. qui effectue des actes de commerce sur le territoire de la France ne peut opposer à l'action introduite par Chaliapine l'immunité de juridiction;
>
> dit que le tribunal de commerce de la Seine était compétent pour statuer sur le litige dont il s'agit . . . .'

There can be no doubt—the judgment as much as the order makes it abundantly clear—that the Paris Court of Appeal issued and intended to issue its process against the Trade Delegation as such and not against the U.S.S.R. itself: it was the Trade Delegation which was the party to the action and had been effectively brought before the Tribunal. The Court held the Trade Delegation liable in respect only of the copies introduced into France. In respect of those copies, though not directly introduced by the Trade Delegation, the Court held the Delegation liable because it found a sufficient connexion between the Delegation and the principal tortfeasor, the organization in Moscow having the monopoly of export of Russian books. This connexion the Court held to the one of 'représentation'. Again, therefore, we see that, although the Trade Delegation has sufficient individuality to be cited as a party, it is sufficiently connected with other commercial organizations in Russia—as 'un des rouages du monopole du commerce'—to bear responsibility for the acts of those organizations. But it is the Trade Delegation and not the U.S.S.R. against whom judgment is pronounced.

The order of the Court of Appeal was on 15 December 1936 affirmed by the Cour de Cassation (Chambre des Requêtes). The judgment in cassation lacks the precision of the judgment of the Paris Court of Appeal. In answering and rejecting the appellant's contentions the Cour de Cassation speaks of the Paris judgment as if it had 'condamné l'U.R.S.S. prise en la personne de sa représentation commerciale en France' or had purported to 'retenir devant les juridictions françaises l'U.R.S.S.', or 'a pu décider que l'importation des livres incriminés engageait la responsabilité de l'U.R.S.S.'; and these expressions, if over-meticulously considered, are inexact or even, possibly, misleading. But seeing that the Court was affirming the Paris order, which was quite unambiguous, these expressions are more reasonably taken as a shorthand paraphrase of that order and not as intending to subvert the basis of the order which was being affirmed. In no part of its judgment does the Cour de Cassation suggest that it is substituting other and better reasons for the conclusions of the Court of Appeal of Paris: what it expressly says is that the reasons adduced by the latter are good and sufficient.

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[1] Reproduced in D.P. 1934. 2, at p. 144.

The view here taken of *Chaliapine*'s[1] case is that enunciated in *Socifros* c. *L'U.R.S.S.*[2] Though this case concerned immunity from execution, the Court of first instance stated:

> 'Il échet encore de constater que toutes les décisions de justice citées[3] en l'espèce, autres que celle[4] qui est à la base du présent procès, ont été prononcées contre la Représentation commerciale soviétique et non contre l'Union soviétique, dont la personne morale est hors d'atteinte en vertu de sa souveraineté.'

The Aix Court of Appeal categorically supported this proposition, and stated specifically of *Chaliapine*'s[1] case that judgment was rendered there against the Trade Delegation and not the U.S.S.R. and was not 'en contradiction avec la jurisprudence constante', though it was distinguishable as concerned with immunity from jurisdiction. At about the same time, in the long and complicated litigation *Hertzfeld* c. *L'U.R.S.S.*,[5] the plaintiff equally failed to obtain from the Paris Court of Appeal a declaration of liability when he sought it against the U.S.S.R. itself.[6]

If the view here taken of the decided cases is correct—and a foreign commentator is bound upon such a matter to show great hesitation—it follows that the 'acte de commerce' theory has not in France had the effect, which it is sometimes claimed to have had, of sweeping aside the state's immunity, either in respect of jurisdiction or of execution. Even in cases concerning the U.S.S.R., admittedly the extreme cases, the U.S.S.R. as such remains at least technically immune.

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[1] *Supra*, p. 314, n. 3.

[2] Trib. civ. Toulon, 26 April 1938, 1939 *Darras* 303; Aix, 23 November 1938, D.P. 1939. 2. 65, with a note by Colliard. The facts of the case are set out *supra*, p. 303.

[3] Which included *Chaliapine*'s case.

[4] An unreported decision of the Tribunal commercial de la Seine of 27 June 1934: as to which see *supra*, p. 303. This decision was treated by the Court as a mere aberration.

[5] First round: 1930 *Darras* 284; 1931 *Darras* 325; Cass. req., 11 April 1933, D.P. 1933. 1. 161; second round: Trib. civ. Seine, 19 October 1933, 1934 *Darras* 156; Paris, 14 April 1938, 1938 *Darras* 497, 1938 *Clunet* 1034.

[6] This case concerned the Russian Volunteer Fleet (Dobroflotte). For an English view of the status of this body see *Russian Volunteer Fleet* v. *The Crown* (1923), 15 Ll.L.L.R. 74, Bailhache J. In the first round the plaintiff endeavoured, without success, to obtain an *exequatur*, extended to cover the U.S.S.R. itself, of a judgment rendered by Mackinnon J. in the King's Bench Division against the Dobroflotte: (1925), 22 Ll.L.L.R. 166. In the second round the plaintiff endeavoured, equally without success, to obtain in an 'instance principale' a declaration of the joint liability of the U.S.S.R. itself in respect of a breach of contract committed by the Dobroflotte. As customary, the Paris Court of Appeal, when refusing jurisdiction, spoke of the U.S.S.R.'s act as one 'de puissance publique'.

The 'acte de commerce' is, however, not without importance: it will predispose the French court to attempt to find, if possible, some entity upon which to fasten liability in respect of such acts, especially if the state concerned, like the U.S.S.R., has as a matter of policy created a monopoly of commerce and seeks to clothe the monopoly-agency with the immunity belonging to the state. In such circumstances, at least, the French courts will not too anxiously examine the foreign state's legislation in an attempt to discover whether according to that legislation the entity concerned has or has not a separate corporate personality. If the agency (however it may be designated internally) is one not normally created by normal civilized states or if created is normally recognized as being distinct from the state and as exercising functions not normally regarded as governmental functions—e.g. a public or semi-public corporation in the United Kingdom—then that agency, however actually created, will, if it engages in commerce, be treated by the French courts as *distinct from the state for the purposes of the immunity rules*. It will be treated as sufficiently a distinct entity to be impleaded in the French courts, and execution will issue against property in France reasonably identified as belonging to it. Whatever may be the juridical difficulties involved—and they are not great in a system such as the French which has a reasonable and realistic theory of associations—the French courts, it is respectfully submitted, have shown in this matter common sense, and their method of action should be followed.[1] So acting, the French courts, it is believed, have remained faithful to the classical doctrine of the immunity of the state as such, firmly expressed in strict and absolute terms.

Two cases,[2] though not concerned with 'acte de commerce', may be interposed here to show both the strictness of the French immunity rule and the distinctions which the courts are willing to make. Both the cases concern the removal by the Spanish Republican authorities during the late Spanish civil war of securities and valuables deposited by third parties in banks in those parts of Spain which were in immediate danger of seizure by General Franco's troops, their shipment abroad, and their trans-shipment in French harbours. The cases gave rise to much discussion owing to the political passions involved. Some of the complication of the facts must here be omitted. In the *Rousse et Maber* case, by order of what was called the Basque 'Government', acting under instructions from the Republican Government, the securities and valuables were seized, packed in cases, and shipped by the banks themselves. In the *État espagnol* case, the shipper consignor of the chattels similarly seized and packed was the Republican Government, which was also the charterer and the consignee. The ships transporting the cases were British. Upon their arrival at French harbours, La Pallice and Le Havre respectively, the owners (*inter alios*) of the securities applied for and obtained[1] '*saisies-revendications*' of the relevant cases. Despite claim of immunity made in the one case by the Basque 'Government' supported by the Republican Government and in the other by the Republican Government itself, the orders were confirmed. Upon appeal, in the *Rousse et Maber* case, the Court of Appeal of Poitiers affirmed the *saisie*; in the *État espagnol* case the Court of Appeal of Rouen reversed the Court of first instance and dissolved the *saisie*.

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[1] The French courts, it is believed, would not have reached the view adopted in England by the Court of Appeal in *Krajina* v. *Tass Agency of Moscow*, [1949] 2 All E.R. 274.

[2] *Rousse et Maber* c. *Banque d'Espagne et autres*: Poitiers, 26 July 1937, S. 1938. 2. 17, with a note by Rousseau; D.P. 1937. 2. 89, with a note by Savatier; *État espagnol et autres* c. *Banco de Bilbao et autres*, Rouen, 7 December 1937, S. 1938. 2. 23, with a note by Rousseau; D.P. 1938. 2. 17, with a note by Lapradelle. See also article by Carabiber in 1938 *Darras* 369.

The distinctions are no doubt fine, but it seems as if the English courts might have reached the same result.[2] In the *État espagnol* case the person in possession and control of the cases was, it would seem, the Central Republican Government which admittedly was at that time a foreign sovereign state. In the *Rousse et Maber* case it would seem as if the banks remained in possession, and in any event the Basque 'Government' was not, according to a 'jurisprudence constante', entitled to claim immunity since it was a subordinate authority.[3]

We have already noted[4] that two cases relied upon by French commentators as indicating that the French courts accept a doctrine of very limited immunity would present little difficulty from an English point of view. In *État roumain* c. *Demoiselle Arricastre*[5] it was held that a foreign state, 'institué légataire universel' to a deceased whose 'succession' was opened in France, could be sued in France by the creditor of the deceased.[6] The administration of estates in France follows principles radically different from those of English law; but it may be argued that in England also, in proceedings for the administration of an estate, the character of the executor, whether or not he is a beneficiary, is irrelevant. The executor, whether or not a foreign state, has no personal obligation in respect of the deceased's debt: proceedings to obtain payment of it seem to be directed against the estate rather than against the executor. Though not strictly speaking a trustee, the executor resembles a trustee in many particulars; and it would seem that an English court is not deprived of jurisdiction over an English trust by reason only of the fact that one of the beneficiaries or trustees is a person entitled to immunity.[1]

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[1] From the Tribunal civil of la Rochelle and le Havre respectively.

[2] But note that the French courts do not accept the view of the effect of confiscation established in England in *Luther* v. *Sagor*, [1921] 3 K.B. 532. On confiscation see *État russe* c. *Bourgeois* (*La Ropit*), Cass. req., 5 March 1928, D.P. 1928. 1. 81, with a note by Savatier; 1929 *Darras* 288, with a note by Niboyet. Also Cass. req., 4 July 1933, D.P. 1934. 1. 10; and Cass. civ., 14 March 1939, S. 1939. 1. 182. And see 1947 *Darras* 160.

[3] See *infra*, p. 223.

[4] *Supra*, p. 321.

[5] Bordeaux, 8 December 1937, 1938 *Darras* 297, with a note by Batiffol.

[6] Another case of such a 'légataire universel', which caused some stir at the time but is only slightly relevant to the discussion in the text, is *Héritiers du Plessis-Bellière* c. *S.S. Léon XIII* (Trib. civ. Montdidier, 4 February 1892, 1892 *Clunet* 447; Amiens, 21 February 1893, 1893 *Clunet* 384; Cass. req., 16 March 1894, 1894 *Clunet* 835).

A more interesting, and more difficult, case is the *Affaire Vestwig*[2] which an English commentator would link with the *Arricastre* case, though no 'succession' was in question, on the view that the notion of trust is common to both. The facts of the case were as follows: Robertson, an exporter of salt cod, domiciled in Norway and using Vestwig as his agent in France, sold divers large cargoes of this fish to various persons trading at Bordeaux. In February 1940, to secure payment of the purchase price of the cargo *ex* Havorn, irrevocable credits were opened by the buyers in a bank in Norway to Robertson's order. In April 1940, upon the invasion of Norway, these credits were transferred to French banks in France. In France on 5 June 1940 these credits, by agreement between the buyers and Robertson represented by Vestwig and upon order from them, were transferred by the banks to a special account opened in the name of the Norwegian Government, which account the banks stated that they held 'au profit de Robertson'. These various transfers, it was alleged, were made in an attempt to give both buyers and sellers the maximum security. The cargo *ex* Havorn duly arrived, but a large sum still remained in the said special account. In May 1940 Robertson sold a further cargo to arrive *ex* Rolf-Jarl. This cargo failed to arrive in circumstances which, it was held by the Bordeaux courts, caused liability to fall upon Robertson. Robertson's creditors in respect of the Rolf-Jarl cargo applied for and obtained *saisies-arrêts* upon the funds standing in the special account opened in the name of the Norwegian Government and in due course these funds by divers orders of the court, dated 23 July 1940 and subsequently, were paid to the said creditors. Long after these orders had become final, the Minister of Justice at the request of the Norwegian Government brought before the Cour de Cassation a 'pourvoi en annulation' against the said orders and also against a judgment of the Court of Appeal of Bordeaux which was involved, upon the ground that they had violated the immunity of the Norwegian state. It should be noted that the Norwegian state had never been impleaded: the orders were directed to the French banks and issued instructions concerning funds in their actual possession; moreover the French banks had executed the orders.

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[1] See, e.g., *Gladstone* v. *Musurus Bey* (1862), 1 H. & M. 495; *Larivière* v. *Morgan* (1875), L.R. 7 App. Cas. 423; *Stronsberg* v. *Costa Rica* (1881), 44 L.T. 199; *In re Russian Bank for Foreign Trade*, [1933] 1 Ch. 745.

[2] Cass. req., 5 February 1946, S. 1947. 1. 137, which sets out the *requête* of the *procureur-général* and the *rapport* of Castets. The *rapport* is also interesting on the scope of the '*pourvoi en annulation*': see *Hanukiew*'s case, *supra*, p. 301, and *Pick* v. *Bernheim* (Cass. req., 5 February 1936, 1936 *Darras* 451, note).

The Cour de Cassation rejected the *pourvoi*. Castets in his *rapport* describes the Norwegian Government as merely '*le prête-nom et le mandataire*' of Robertson. The judgment accepts this notion;[1] and having stated that the Norwegian Government

> 'ne devait jouer dans l'affaire que le rôle de mandataire chargé d'encaisser les sommes aux lieu et place de Robertson . . .'

the Court goes on to hold that

> 'Robertson ayant conservé la propriété exclusive des fonds figurant aux comptes de l'État norvégien, la saisie de ces fonds n'a pas été pratiquée sur un bien appartenant à cet État'.

This is an interesting and probably a sound reason.[2] The Court was willing to find that the Norwegian state was, as we might say, in the position of a bare trustee of the funds standing to its account at the bank; and consequently an order addressed not to the state but to the bank directing the transfer of those funds affected neither that state nor that state's property. It is suggested that, on the existing authorities, this view might commend itself to an English court also, though, as Castets' report points out, it involves an inquiry[3] into the nature of the 'mandat'—the circumstances, that is, under which the special account was opened. Upon this, the main, ground stated by the court, the *Affaire Vestwig* does not mark any startling innovation in the practice of state immunity.[4]

5. *Entities distinct from the state*

In the 'Soviet cases', if the interpretation of them above submitted is correct, the French courts were willing to disassociate from the state, for the purpose of refusing to them state immunity, persons or organizations apparently governmental or closely analogous thereto.[1] It is accordingly relevant to inquire what attitude has been adopted by the French courts towards such persons or organizations generally. We can, however, select only some typical instances.

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[1] Having considered the letters and telegrams passing at the time of the opening of the special account, the Court rejected, as did Castets, the suggestion that the special account was opened for the purpose of transferring to the Norwegian Government beneficially the funds standing to Robertson's credit.

[2] It should, however, be noted that Castets in his *rapport* shows considerable favour to Niboyet's doctrine (see *supra*, p. 298), which formed a second reason for the Court's judgment.

[3] Consider, e.g., *The Jupiter* (No. 3), [1927] P. 122.

[4] Most French commentators (but not Batiffol: op. cit., § 705) allege that the French courts would not grant immunity to a foreign state in respect of French real property. There is no authority in the form of case law for such a view. The case usually cited, *État de Suède* c. *Petrocochino* (Trib. civ. Seine, 30 October 1929, D.H. 1930. 15), holds only that a foreign state, the purchaser of the reversion of a lease, is bound by the Rent Restriction Acts (loi sur les loyers du 1 avril 1926) and cannot evict the sitting tenant upon the expiration of his term. Land occupied for diplomatic purposes or by a diplomat would of course additionally enjoy *diplomatic* privilege (see, e.g., *Suchet duc d'Albufera* c. *État français*: Trib. civ. Seine, 5 January 1939, 1939 *Clunet* 605; *Foy* c. *Wedel Jarlsberg*: Trib. civ. Seine, 26 October 1916, 1917 *Clunet* 588), though the French courts do not accept the notion of extraterritoriality (see the cases of *Nikitschenkoff*, Cass. crim., 13 October 1865, S. 1866. 1. 33, and *Époux Basiliadis*, Paris, 1 March 1922, D.P. 1923, 2. 59; and authorities collected in 1931 *Clunet* 562, note).

(i) *Members of federal states, &c.* In the case of Confederate states or members of a Union, and of autonomous districts or provinces or municipalities of a state, though the separate corporate personality of these bodies is not in question, the French courts have adopted a similar attitude. These bodies, whatever may be their internal constitution, are treated as distinct from the sovereign foreign state recognized as a person by public international law. The French courts grant immunity only to the sovereign foreign state so recognized and refuse it to these other bodies. The case law on this point is fixed and long established.[2]

Perhaps the best-known case on this question is *Ville de Genève* c. *Consorts de Civry*,[3] partly because of the notoriety of the facts—the case concerned the administration of the estate of the Duke of Brunswick, a matter which was still occupying the French courts in 1935[4]—and partly because of the troubles which the decision provoked between France and Switzerland, but mainly because of the remarkable note by Pillet appended to the report.[5] The Paris Court of Appeal had held, *inter alia*, that immunity could be claimed neither by the City of Geneva[6] nor by the Cantons of Switzerland, but only by the Swiss Confederation, the international person.

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[1] See the interesting article by Fawcett, 'Legal Aspects of State Trading', in this *Year Book*, 25 (1948), pp. 34–51, in which he discusses the French cases only incidentally. See also the lucid note by Fox in *A.J.*, 35 (1941), p. 632. Dr. Mann has drawn attention to the decisions of the English courts in the eighteenth and nineteenth centuries concerning the East India Company in an article dealing with the proper law of state contracts, in this *Year Book*, 21 (1944), pp. 11–25. It is to that topic exclusively that belongs the case of *Carathéodory* c. *État Français*, often miscited, which, as decided by the Cour de Cassation on 31 May 1932 (1934 *Darras* 909), holds that Ottoman law may apply in a contract for the lease of a house in Turkey by the French Government from the Turkish owner. Cf., for a similar view in England, *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500.

[2] In the case of Brazil it has been held that its constituent states cannot claim immunity: *State of Céara* v. *Dorr and Others* (Cass. civ., 24 October 1932, D.P. 1933. 1. 196), with an interesting note by Gros, reporting also *State of Céara* v. *d'Archer de Montgascon* (Paris, 11 June 1931, ibid., p. 200), followed in respect of the state of Amazon (Trib. civ. Seine, 2 March 1948; Gaz. Pal. 1948. 1. 139). So, too, in the case of the Republic of Colombia, as regards the former state of Antioquia, *Crédit Foncier d'Algérie* c. *Département d'Antioquia et Restrepo*, Trib. civ. Seine, 11 December 1922, 1922–3 *Darras* 748, where the often quoted argument of Lyon Caen is to be found. So also, during the Spanish Civil War of 1936–9, immunity was refused to the 'gouvernement d'Euskadie', the autonomous Basque Province set up by the Spanish Republic (*Rousse et Maber* c. *Banque d'Espagne*, Poitiers, 26 July 1937, S. 1938. 2. 17, *supra*, p. 317). On the position of the Basque Government see Chaveau in *Semaine Juridique*, 1938, p. 609, commenting on the decisions of the Tribunal Civil de Bordeaux of 3 September 1937 and the Tribunal Civil d'Oloron Ste-Marie of 16 November 1937. As regards Catalonia, see the somewhat ambiguous expressions in *Officina del Aceite* c. *Domenech*, Aix, 9 December 1938, D.P. 1939. 2. 70, *infra*, p. 326.

[3] Paris, 11 June 1894; Cas req., 1 July 1895, S. 1896. 1. 225.

[4] See 1935 *Darras* 790.

[5] *Ubi supra*: S. 1896. 1. 225.

[6] Compare, concerning the city of Tokyo, Cass. civ., 14 January 1931, S. 1931. 1. 125.

On this part of the decision no appeal was brought. Pillet, whilst approving the judgment upon other grounds, was of opinion that the refusal of immunity for the reasons given not only was in conflict with the view the French courts had taken of the status of semi-sovereign states but also that it irrationally ignored the fact that a constituent state in a Federation or Union could be as much the organ of the international state as was an administrative authority created by a unitary or centralized state. Surely, he argued, the total immunities actually enjoyed in international law by a state cannot depend upon the choice made by that state of the kind of internal organization it saw fit to adopt.[1]

The difficulty, rightly noted by Pillet, is perhaps more easily resolvable in terms familiar to the common law. The relevant distinction seems to be between the quashing of a writ improperly issued and the successful raising of a plea of immunity in proceedings properly begun. If the party impleaded is a legal person distinct from the person of the international state, the writ impleading that party is not on the face of it bad. If the party impleaded is the international state in its capacity as such, the writ should without more be quashed. But even if a party distinct from the foreign state has properly been impleaded, the foreign state ought still to be able to come in[2] and successfully plead the immunity of the impleaded party or of the object, usually a ship, against which proceedings *in rem* have issued. It is believed that the English courts would follow the French courts in this matter, at any rate in not without more quashing a writ issued against a constituent member of a Federal or Confederate state or an autonomous Province or Department. In so doing they would differ from the courts of the United States of America. The principle would seem to be that the rule which prohibits the impleading of a foreign state is not as such infringed by the impleading of a legal person distinct from the state, whatever may turn out to be the relation between that person and the state; but the fact that the writ may have been *ex facie* lawfully issued should not finally determine the question whether the state will be able to claim immunity.

(ii) *Semi-sovereign states.* Whilst refusing immunity to states constituent of another state, the French courts have recognized the immunity of 'semi-sovereign' states, at any rate if under the protection of France, as English courts have done in the case of states under the protection of the Crown. The case law is again considerable and unanimous.[3] It must, however, remain doubtful in the case of French courts, as of English, how far, if at all, they will recognize as sovereign such states as are under the protection of some third state. The French courts did in fact recognize the sovereign status of Egypt in *Solon* c. *Gouvernement Egyptien*,[1] in this differing from the view taken by the English court in *The Charkieh*.[2] They have also recognized the Congo as a sovereign state—see *Huttinger* c. *Société des Chemins de Fer du Congo*[3]—but that, too, was a special case. There does not seem to be sufficient authority to decide what view they would adopt as a general principle.

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[1] Rousseau, in a note (S. 1938. 2. 16, *supra*, p. 317), takes Pillet's point that a constituent state or Province may be an organ of the Confederate state: 'un organe exécutif d'une unité administrative décentralisée'. Niboyet (op. cit., § 1771) agrees with the case law, but does not perhaps sufficiently resolve the difficulty noted by Pillet.

[2] On the French law as to the foreign state coming in see *supra*, pp. 299, 300.

[3] As regards Morocco see, *inter alia*, the following decisions: Cass. civ., 30 June 1937, *Nacivet* c. *Isaacson* (S. 1937. 1. 336); Cass. req., 20 November 1934: *Gouvernement Impérial du Maroc et*

Putting aside the special case of Federal or Confederate states, of autonomous Provinces, of districts and municipalities, and of semi-sovereign states, and turning to the governmental or quasi-governmental organizations and departments (including commissions and public authorities) normally used or becoming usual in unitary states other than the U.S.S.R., we find that there is comparatively little authority in the French courts as to their status so far as the immunity rule is concerned. This lack of authority should not, however, be allowed to obscure certain elementary points which because they are elementary are apt to be forgotten in spite of their fundamental importance.

(iii) *State organs and institutions*. When the French courts are confronted with an institution of a foreign state—such, for example, as the British Admiralty—which falls within the traditional pattern of state activity and which is recognized by them as the equivalent of an organ of the French state familiar to themselves as a state organ, they do not pause to inquire how by internal constitutional law that institution may be organized. They are not concerned to discover whether the British Admiralty is technically a corporation having a personality distinct from that of the Crown and capable of being sued as such in the English courts. Whatever its internal nature, the institution is without more recognized as being or representing the foreign state and as having the same claim to immunity as the state itself. It is recognized as indisputably a state organ. It is perhaps because

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Maspero c. *Laurens et autres* (S. 1935. 1. 103), on appeal from Aix, 30 December 1929 (D.P. 1932. 2. 153, with an interesting note by Pic); Cass. req., 31 January 1933: *El Hadji Larbi* c. *Si Mohamed ben Ahmed* (D.H. 1933, 131). As regards Tunisia see *Consorts Ben Aiad* c. *Gouvernement Tunisien*, Algiers, 22 January 1914 (1919 *Darras* 494), after a series of cases commencing with Paris, 14 December 1893 (D.P. 1894. 2. 421); Cass. civ., 21 January 1896 (D.P. 1897. 1. 305, with a note by Valéry). See also *Colin* c. *Bey de Tunisie*, Trib. civ. Seine, 1 May 1867 (reported in the note by Royer, D.P. 1867. 2. 49). For the Lebanon see *C.* c. *Compagnie du Chemin de Fer de Damas*, Beyrout, 6 May 1925, 1927 *Clunet* 156). As to Andorra see the curious case of *Société 'Le Nickel'*, Conseil d'État, 1 December 1933 (1935 *Darras* 788, with a note by Rousseau). With regard to Monaco see Trib. civ. Seine, 6 December 1933 (1935 *Clunet* 79), granting an exequatur to a Monaco judgment.

[1] Trib. civ. Seine, 16 April 1847, D.P. 1849. 1. 7, note. See also the decision of the same Court of 5 February 1874 (cited by Féraud Giraud, *États et Souverains*, etc., vol. i (1895), p. 40).

[2] (1873), L.R. 4 A. & E. 59.

[3] See *supra*, p. 306.

the French and English courts are not in their internal law familiar with a state which is a constituent member of a Union or Confederation that they have failed to recognize it as a state organ (if, indeed, it be such), but, classifying it according to their own categories (as is almost inevitable and perhaps proper), they have seen in it the equivalent of a county or department or of a municipality or a borough, which though having a public status would not in the domestic system be recognized as organs of the central state.

It is only if the institution is unfamiliar, if it seems to fall outside the traditional pattern and is not matched by a French institution known to the courts as a state organ, that inquiry is made into its precise nature. In such inquiry the view taken of that institution by its own state is evidently of importance, at any rate if the state concerned is a reputable state whose general system is reasonably known to the French courts. In a case where such a state declares that it recognizes the institution as a state organ which is discharging a state activity, the French courts have been very ready themselves to recognize it as a state organ and to extend immunity to it, particularly if it is not a corporation having a distinct legal personality and if it does not engage exclusively in commerce. But this recognition of a foreign and unfamiliar institution as a state organ is and, it is submitted, should be a matter for the discretion of the French court. If the foreign state itself does not recognize it as a state organ, that, no doubt, is determinative of the issue. If, however, the foreign state does recognize it as a state organ, then it is submitted that the French courts are not bound either to refuse it immunity because it happens to have a distinct corporate existence by its own internal law, or to grant it immunity because it happens not to have that existence: though that internal corporate personality is evidently a factor of some importance.

The United States Shipping Board,[1] as defendant during and immediately after the First World War, provides an instance of the attitude of the French courts on this matter. Whether or not a ship is manned by a naval crew,[2] whether or not a ship is managed by a commercial line,[3] whether or not an adventure is purely commercial,[4] proceedings cannot be taken against a ship the property of the United States Shipping Board because the Board is the state organ of a foreign state; and personal process cannot be issued against that Board even in the person of its agents and even if the origin of the debt is purely commercial.[1] These cases are the more remarkable for being decided by commercial courts, which were willing to restrict immunities as much as was feasible.

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[1] These cases are cited by Allen, *The Position of Foreign States before National Courts* (1933), Part II, C.

[2] See *The Powhatan*, Trib. comm. St.-Nazaire, 8 May 1918: *Revue internationale de droit maritime*, 32, p. 439.

[3] See *The Englewood* (*supra*, p. 307, n. 2); and *The Balosaro*, Trib. comm. Havre, 17 September 1919: *Recueil du Havre*, 62 (1918–19), Part 1, p. 31; *Gazette des Tribunaux*, 1920, Part 2, p. 93.

[4] See *The Glenridge*, Trib. comm. Havre, 17 July 1920: *Revue internationale de droit maritime*, 32, p. 599.

Similarly, as we have seen, the Paris Court of Appeal[2] was willing to treat the Office Suisse des Transports Extérieurs as a state organ 'considérant que l'Office n'a pas la personnalité juridique et n'est qu'un service dépendant officiellement du "Département politique" ', and granted it immunity, at any rate after noting that the purposes of the Office were non-commercial, 'excluant toute recherche de bénéfices et toute idée de spéculation'. Even the Office National du Tourisme Espagnol has been held entitled to immunity.[3] The Court held 'qu'il importe seulement de fixer . . . si le défendeur au référé est ou non un État étranger souverain', and that, account had of the decrees creating the Office, the Office was 'un organisme d'État sans caractère commercial' and that therefore the Court was incompetent. *A fortiori* (though in a previous case, decided on 30 December 1930)[4] the same Court held that the Administration autonome des Monopoles of the Yugoslav state was entitled to immunity. In that case the holders of bonds issued by the Serbian Government had executed a *saisie-arrêt* upon balances owed by the Ottoman Bank and others to the Administration autonome. The Court, quashing the *saisie-arrêt*, held that the Administration autonome

> 'n'est qu'une institution d'État, chargée par le gouvernement yougoslave et pour son compte, de la gestion et de la comptabilité des emprunts gouvernementaux et des monopoles d'État; que le seul débiteur des emprunts . . . est l'actuel gouvernement royal yougoslave, — État souverain contre lequel une saisie-arrêt ne peut être autorisée'.

Perhaps the most instructive case in this series is *Lahalle et Levard* c. *The American Battle Monuments Commission*.[5] The plaintiffs, architects, sued the Commission, which had been operating in France, for damages for breach of contract. The Commission did not enter an appearance. The inferior Court, finding it to be the duty of the Court 'de vérifier sa propre compétence', went on to consider the Act of Congress establishing the Commission, and held that the Commission's functions 'sont dépourvues de tout caractère commercial'; that it

> 'apparaît non comme un organisme doué d'une personnalité juridique propre mais

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[1] See *The Avensdaw*, Trib. comm. Rouen, 20 January 1922: *Revue internationale de droit maritime*, 34, p. 1074. For a similar view taken by the English courts see *Compania Mercantile Argentina* v. *United States Shipping Board* (1924), 40 T.L.R. 601 (C.A.).

[2] 16 March 1921, in *Lakhowsky* c. *Office Suisse des Transports Extérieurs*: 1922–3 *Darras* 745. See *supra*, p. 308.

[3] *Société Viajes* c. *Office National du Tourisme Espagnol*, Trib. civ. Seine, 17 October 1936: 1937 *Darras* 187, with a note by Kiefé.

[4] *Banque Ottomane et Soc. fin. d'Orient* c. *Philippe*: 1931 *Clunet* 1040.

[5] Trib. civ. Seine, 27 June 1934, and Paris, 28 February 1936: 1937 *Darras* 484, with a valuable note by Niboyet.

comme un simple service de l'État américain émanant du Président de cet État . . . qu'il ne se distingue donc point de l'État américain et doit en conséquence bénéficier de l'immunité de juridiction'.

The Court of Appeal of Paris, whilst approving the reasons of the inferior judges, added that

'il convient de tenir le plus grand compte de la déclaration du gouvernement[1] des États-Unis qui affirme que The American Battle Monuments Commission est un organisme d'État'.

In this case, no doubt, much is made by the Court of the Commission's lack of separate corporate personality. It is indeed *pro tanto* a valid reason for the Court's refusal to distinguish between the Commission and the United States Government. But it is not, it is submitted, of itself necessarily a conclusive reason; and certainly this case is not authority for the converse proposition, namely, that if the Commission had had a distinct legal personality (and on this *quaere* what would have been the view of the United States courts) it could not have been granted immunity. The nub of the matter is that, in view of its constitution and its functions, the French courts are content, and rightly, to treat the Commission as 'un organisme d'État' for the purposes of the immunity rule.

In the matter of state railways the French courts seem to have wavered. In the *Caratier-Terrasson* case[2] the Cour de Cassation granted immunity, at any rate from execution, to the 'Direction générale des Chemins de fer d'Alsace-Lorraine' upon the ground that it was an 'administration publique' of the German state, that its operation was 'le fait de l'État luimême', and that its property was in effect the property of the German state. A similar result seems to have been reached as regards Belgian State Railways by the Tribunal Civil de Lille on 26 June 1885. Nevertheless, judgment was given against the Compagnie du Sud-Est des Chemins de Fer de la Russie, which was alleged to be a state railway.[3] Though the matter may not be free from doubt, it is submitted that, for example, 'British Railways' would not be granted immunity from process by the French courts.

A case in which immunity was granted but which seems dubious is the decision of the Court of Appeal of Aix of 9 December 1938 in *Officina del Aceite* c. *Domenech*.[4] The facts were as follows: The respondent, who alleged himself to be the creditor of the Conselleria dei Proveiments of the

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[1] On the matter of declarations by the Executive see the extensive studies by Lyons in this *Year Book*, 1946, 1947, and 1948, and in particular his third article, 'Conclusiveness of the Statements of the Executive: Continental and Latin-American Practice', ibid., 25 (1948), pp. 180–210.

[2] See *supra*, p. 302.

[3] See the *Gamen-Humbert* case, *supra*, p. 304.

[4] D.P. 1939. 2. 70, with a useful preceding note by Colliard; *Annual Digest and Reports of Public International Law Cases*, 1938–40, Case No. 81, with a valuable note by Dr. Lipstein, who gives references to most of the relevant cases. The proceedings in first instance (Trib. comm. Marseille, 11 May 1938) are reported in 1939 *Darras* 133.

Généralité of Catalonia, obtained an order authorizing him to execute a *saisie-arrêt conservatoire* upon barrels of olive oil recently landed upon the quays of Marseilles. The Officina showed cause against this order upon the ground, *inter alia*, (*a*) that the oil was the property of the Officina and not of the *Généralité* of Catalonia, (*b*) that the Officina was 'un organisme juridique tout à fait distinct de la généralité de Catalogne', (*c*) that the Officina 'en tant qu'administration intégrée dans l'État espagnol' was entitled to immunity, particularly from execution. The Tribunal de Commerce of Marseilles rejected these grounds and in particular held (though for reasons which do not commend themselves to the present writer) that the Officina 'bien qu'organisme du gouvernement de la République espagnole n'est pas fondée en l'espèce à invoquer l'immunité de juridiction' or of execution.

Upon appeal, the Court of Appeal of Aix, reversing the Tribunal of first instance, held as to (*a*) that the olive oil was the property of the Officina, and as to (*b*) that the *Généralité* and the Officina, 'personnalités juridiques bien distinctes, agissaient chacune dans sa sphère propre et n'assumaient nullement la responsabilité des dettes de l'une ou de l'autre'.[1] These findings, which largely depend upon fact and may be acceptable, are sufficient to justify the Court's decision. The Court nevertheless went on to hold hypothetically as to (*c*) that the Officina, 'organisme dépendant de l'État espagnol, aurait été en droit d'invoquer l'immunité d'exécution si la créance de Domenech aurait pu être établie à son encontre'.[2] It is this last holding which, to the present writer, seems suspect. It is submitted that, on the French authorities, the Officina, whether or not 'un organisme d'État' in some sense or another, is precisely the kind of entity to which the French courts, showing good sense in this matter, are apt to refuse to extend immunity, particularly when that entity has been found to have a 'personnalité juridique bien distincte' and seemed to be engaging mainly if not exclusively in commerce. It is difficult to square this decision with the decisions of higher authority concerning the U.S.S.R. even if those decisions are given, as they should be, their most restrictive interpretation. Moreover, if it was rightly decided that the Australian Wheat Board[3] was subject to French jurisdiction, it would seem *a fortiori* that the Officina should be so subject. No doubt the violence of the political passions then raging on the subject of Spain had something to do with the formulation by the Court of Appeal of Aix of a somewhat hypothetical conclusion.

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[1] For a contrary opinion, in the case of the U.S.S.R., as to the mutual responsibility of distinct legal persons engaged in state trading, see *supra*, pp. 312–16.

[2] For dubious statements by this Court as to the status of the *Généralité* of Catalonia see *supra*, p. 321, n. 2.

[3] *Min. du Commerce* v. *Australian Wheat Board*, Trib. comm. Seine, 22 September 1922; 1922 *Darras* 748.

(iv) *Agents.* To some extent connected with the question of separate interposed organizations or persons is that of agents other than diplomatic or quasi-diplomatic officials.[1] French law on the matter of state immunity as regards agents[2] properly so called—i.e. persons who establish a contractual relationship between the foreign states and third parties—is clear and long established, having been settled with reference primarily to state loans.[3] The immunity of the state extends to those who negotiated the loan on behalf of the state and to those charged by the state with its service. A recent enunciation of this rule is to be found in *Laurans* c. *Gouvernement du Maroc et Maspéro*,[4] decided by the Cour de Cassation (Chambre des Requêtes) on 20 November 1934, concerning the 1904 Moroccan loan. But the immunity extends only to the acts of the agent as agent. If, for example, the bondholders bring an action in France against the bankers who floated the loan in France as agents of the foreign Government *and* go on to allege that, whether by reason of the terms of the contract or as a result of the fraud or negligence of the bankers, the latter have incurred a *personal* obligation to the bondholders, the bankers cannot plead to the jurisdiction of the French courts. It was so held in *Dreyfus et autres* c. *Dreyfus Frères et Cie*[5] by the Court of Appeal of Paris on 25 June 1877, and affirmed by the Cour de Cassation (Chambre Civile) on 14 August 1878, with regard to the Peruvian loans of 1870 and 1872, although on the facts it was found that there was no such personal obligation. The Court of Appeal of Paris might have gone farther in *Bernet et autres* c. *Herran*, *Dreyfus-Scheyer et autres*,[6] concerning the Honduras Loan of 1869, and held that the agents would not be personally liable in respect of statements in the prospectus issued by the foreign Government which were known to the agents to be fraudulent although it was held on the facts that such fraud or negligence by the bankers had not been proved. The matter was not argued in the Cour de Cassation, the appellants failing on a preliminary point.

An instructive pair of cases are the two brought against the Comptoir d'Escompte in respect of the Dom Miguel 1832 Bonds by de Reilhac and de Villaines.[7] The Government of Portugal, which did not recognize the

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[1] For the position of consuls see references in Niboyet's article in 1950 *Darras* 139–50.

[2] For the anomalous position of 'l'administrateur provisoire des biens russes à l'abandon' see Trib. civ. Seine, 7 January and 20 November 1929, *Groffe et Philippe* v. *Jaudon* (1929 *Clunet* 1334) and *Jaudon* v. *Société de l'Industrie chimique* (1930 *Clunet* 685).

[3] On loans see Imbert, *Les Emprunts d'États étrangers* (1905).

[4] Aix, 30 December 1929, D.P. 1932. 2. 153, with a note by Pic; Cass. req., 20 November 1934; S. 1935. 1. 103.

[5] D.P. 1879. 1. 57.

[6] 26 February 1880; Cass. req., 21 April 1886, D.P. 1886. 1. 393. Difficulties were caused in this case by the fact that some of the defendants appeared to be trustees of the issue. The Court of Appeal of Paris treated them as agents of the Government, holding that the status for which the plaintiffs argued was juridically an impossible one.

[7] *De Reilhac* c. *Comptoir National d'Escompte de Paris*, Trib. civ. Seine, 12 June 1895: 1911 *Darras* 648; and *De Villaines* c. *The Same*, same Court, 12 August 1895, and Paris, 26 June 1908 [*sic*] 'faute de diligence'): 1909 *Clunet* 144.

Dom Miguel issue, put 2½ million francs, part of the proceeds of another loan, at the disposal of the Comptoir to redeem such of the Dom Miguel bonds as might be surrendered to them for cancellation. The Court held that by reason of offers contained in advertisements issued by the Comptoir and accepted by the deposit of bonds by de Villaines, the Comptoir had assumed a personal obligation to de Villaines and could be sued by him in the French courts (though upon the facts without success); whereas de Reilhac's action was 'irrecevable' because in respect of him no such personal obligation had been incurred.[1]

On the liability or non-liability in contract of agents properly so called the English courts[2] should have no difficulty in following the French decisions, but where 'agents' in a more extended sense are concerned there may be some difficulty. The French courts seem to have proceeded in part upon the theory of 'faute personnelle détachable du service', a theory familiar to them in their municipal system as the criterion for settling the competence of the civil tribunals in respect of acts of administrative officials. They may be willing to hold the 'agent' liable only in respect of personal fault so defined; the doubt expressed by the Court of Appeal of Paris in the *Bernet* case[3] is instructive. The English courts, which are not familiar with this distinction, may make larger[4] the personal liability of 'agents' in the extended sense.

The kind of difficulty arising is illustrated by the case of *Esnault-Pelterie* c. *The A. V. Roe Co., Ltd.*,[5] decided by the Tribunal civil de la Seine on 1 April 1925. The plaintiff was the holder of three French patents concerning the joystick (*manche à balai*) of aeroplanes, which inventions he had also patented in England under the Patents and Designs Act, 1907. During the First World War the British Air Ministry ordered certain aeroplanes from the defendant Company and specified the Esnault-Pelterie joystick. The Air Ministry further authorized the defendant Company to make use of the Esnault-Pelterie patents according to provisions in the said Act authorizing such user in the public interest in return for payments to the inventor eventually to be settled by the Royal Commission charged with this duty. Some of the aeroplanes so manufactured were delivered to the British forces in France. In respect of the aeroplanes so delivered and generally, the plaintiff sued the defendant for damages for infringement of his patents and for the introduction into France of unlicensed models. In a careful and accurate judgment, but evidently under difficulty, the French court held itself incompetent, mainly upon the ground that the act of the defendant Company was covered by the order and authority of the Air Ministry—i.e. that the Company was an 'agent' (in the extended sense of the word) who had not travelled outside the function delegated to him. The Court said:

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[1] Note that in the case of *Viel* c. *Crédit Lyonnais et autres*, Trib. civ. Seine, 14 May 1935, and Paris, 2 April 1936 (1936 *Darras* 787), concerning the Finnish Railways Loans of 1895–1903, the order made in first instance involved merely the appointment of a person entitled to receive the interest upon the bonds with a protest attached. The order was, moreover, quashed by the Court of Appeal, though some of the grounds of its decision are considered to be incorrect.

[2] Cf. *Smith* v. *Weguelin* (1869), L.R. 8 Eq. 198; *Twycross* v. *Dreyfus* (1877), L.R. 5 Ch. D. 602.

[3] See *supra*, p. 328.

[4] But see *Gladstone* v. *Ottoman Bank* (1863), 1 H. & M. 507.

[5] 1925 *Clunet* 702.

> 'Attendu, en effet, que la règle de l'indépendance réciproque des États doit s'appliquer non seulement aux demandes dirigées contre le gouvernement lui-même mais encore à celles introduites contre les agents, mandataires ou co-contractants de ce gouvernement, à raison des actes qu'ils accomplissent en cette qualité ou en vertu des ordres du dit État.'

This, it is submitted, may be good and sensible French law; but it is to be doubted whether an English court could have reached a similar result, seeing that it rejects for domestic purposes the notion that any person, whether a government executive officer or not, can lawfully be ordered even by his own administrative superior to commit a tort in such fashion as to exclude either his personal liability or the competence of the civil courts to try the claim against him.

Conclusions

The distinction between 'acte de puissance publique' and 'acte de simple gestion', though quite often mentioned by French courts when *granting* immunity, has never been the principal reason adduced by any court of authority for refusing a claim to immunity. There is, however, some limit to the indefinite extension of immunity. The limit is in some manner connected with the notion that the immunity should be limited to the state as a state. This notion has some affinity with the idea that an activity which manifests itself mainly or exclusively in 'actes de commerce' is an activity which is not the state's as such and to which 'le principe de la souveraineté de l'État demeure complètement étranger'.

Nevertheless, except for a decision of a Tribunal de Commerce at first instance in 1924—a decision of no authority—there seems to be no case in which a French court has pronounced judgment, or *a fortiori* issued execution, *against a state as such* in respect even of an 'acte de commerce' by reason merely or principally of the nature of that act. There are several instances where the courts have emphatically refused to do so.

When faced with a situation in which a state claims immunity in respect of an organized activity which seems to a French court to be mainly or exclusively commercial or otherwise to travel beyond the traditional limits of governmental activity as such, French courts are willing, especially in the case of the U.S.S.R., to regard the organ directing that activity as an entity separate and distinct from the state and to subject *that entity*, and such property in France as may be reasonably identified as belonging to it, to the process of the French courts.

It is a matter for the discretion of the French court whether it will or will not hold the entity in question to be distinguishable, for the purpose of the immunity rule, from the foreign state. The fact that the foreign state's own constitutional or internal law recognizes that entity as a governmental organ or holds it to be indistinguishable from the state itself is not conclusive upon the French court. In the case of the U.S.S.R., the highest French courts have repeatedly held that the Trade Delegation was not, for the purpose of the immunity rule, the state or the state's organ in spite of the relevant Soviet law.

However, though not bound by the foreign state's own view, French courts have in general paid due attention to that view. Though not conclusive, the fact that the entity in question has not by its own law a separate corporate personality is a relevant or even an important consideration. There are very few cases, not connected with the U.S.S.R., in which French courts have refused immunity to an entity which might reasonably claim to be a normal governmental organ.

The non-liability of the agents of a foreign state, when they are themselves not protected by a personal immunity (i.e. when they are not themselves diplomatic agents) may give rise to a discrepancy between the French and English rules. Both systems agree in freeing from liability the agent properly so called—the person who establishes a contract between the foreign state and third parties—unless he has personally incurred an additional liability either in contract or, possibly, in tort. But the French courts are inclined, acting upon an analogy from their own internal system, to grant immunity to an agent in an extended sense—i.e. to a person charged with the performance of a duty. It is believed that the English courts would not extend immunity to such a person committing within the jurisdiction a tort at the command of his superior.

In fine, the view suggested in this article is that, if regard is paid only to their actual decisions, French courts have very little departed from the classical principles of state immunity, so far as the foreign state itself is concerned. Such a view is at variance with that of well-qualified French commentators, outstanding among whom is Niboyet. It is therefore submitted with due hesitation. No opinion is here expressed upon the nature, or even the existence, of state immunity as a rule of international law; the present article is offered merely as a study, by a foreign commentator, of French law as revealed by the decisions of the courts.[1]

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[1] The author wishes to record his indebtedness to Dr. Lipstein, M. le président Marc Ancel, and M. le professeur Henri Batiffol who discussed with him the subject-matter of this article.

ACQUISITIVE PRESCRIPTION IN INTERNATIONAL LAW

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Introductory

It is necessary, at the outset, to distinguish between the following meanings of the word 'prescription' in international law:

(*a*) 'Prescription' is used in the sense of 'extinctive prescription' (*prescription libératoire*) or, as we would say in English law, of 'limitation'. In this sense prescription means that, if State A has an international claim against State B which it fails to bring before an international tribunal within a reasonable time, then the international tribunal before which the claim is eventually brought may reject it. This doctrine is subject to the rule that the failure to present the claim must be due to the negligence or laches of the claimant party and not due to the obstruction of the defendant party. The characteristic feature of 'extinctive prescription' as applied to property law is that, though the original possessor can no longer enforce them by action, his substantive rights are not abolished. It is not, however, this form of prescription with which this article is intended to deal.

(*b*) Prescription is also used in the sense of 'acquisitive prescription' (*prescription acquisitive*). In addition to the rule that claims not prosecuted within a reasonable time must be held to have lapsed, all legal systems have found it no less necessary to have a doctrine whereby legal validity can be given to titles to property that are either originally invalid or whose original validity it is impossible to prove. Such a doctrine is known by the name of 'acquisitive prescription'. Its distinguishing feature is that the party who succeeds in establishing a title under this doctrine obtains a substantive right whilst the substantive rights (if any) of the previous possessor (if there is one) are abolished. Confusion has arisen, however, because, apart from the distinction between 'extinctive prescription' and 'acquisitive prescription', writers have also sought to distinguish between different types of 'acquisitive prescription'. The distinction between 'extinctive prescription' and 'acquisitive prescription' is, as we have seen, relatively easy to follow. Writers such as Oppenheim[1] and Schwarzenberger[2] treat these two subjects entirely separately, and so does Verykios,[3] the author of a leading monograph on this branch of the law. But the distinction between the various types of 'acquisitive prescription' is not so easy to follow. What these distinctions are and whether they are necessary is a subject to which we must return, but first it must be shown that a system of 'acquisitive prescription' as such, that is to say a system whereby substantive legal validity can be given to titles that are either originally invalid or whose original validity it is impossible to prove, exists at all in international law.

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[1] Oppenheim, *International Law*, vol. i (7th ed., by Lauterpacht, 1948). For 'extinctive prescription' see pp. 315–16; for 'acquisitive prescription' see pp. 526–9.

[2] Schwarzenberger, *International Law*, vol. i (2nd ed., 1949). For 'extinctive prescription' see pp. 246–8; for 'acquisitive prescription' see pp. 139–41.

[3] Verykios, *La Prescription en droit international public* (1934). For 'extinctive prescription' see chap. iii; for 'acquisitive prescription' see chap. ii. For a useful study of the law relating to

Reasons for the existence of the doctrine of 'acquisitive prescription' in international law

The need to preserve international order and stability is the reason given by the majority of the writers for the existence of acquisitive prescription as a rule of international law.[1] Other reasons are occasionally advanced. Grotius[2] and Vattel,[3] for instance, gave as an additional reason for prescription the presumed voluntary abandonment of his rights by the party who loses title thereunder. Ortolan,[4] on the other hand, based prescription on the theory that, if one state had maintained law and order in a territory and developed it, that state was entitled to sovereignty over it as compared with the state which, though originally possessing the same territory, had neglected it. Secretary of State Olney advanced a similar argument in a letter to Sir Julian Pauncefote, dated 22 June 1896.[5]

In any case the reasons for the existence of a doctrine of acquisitive prescription in international law are so cogent that few authors have denied the existence of the doctrine. Of these perhaps the most significant is Heffter, who wrote: 'Bien que la prescription forme une partie intégrante et nécessaire de tout système complet de droit, le droit international ne saurait admettre indistinctement l'autorité de la prescription.'[6]

F. de Martens[7] and Rivier[8] were others who ostensibly denied the existence of prescription in international law, but in effect they espoused doctrines which amounted to a form of prescription. The reason why these

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extinctive prescription see also King, 'Prescription of Claims in International Law', in this *Year Book*, 15 (1934), pp. 82–97.

[1] See, for instance, Grotius, *De Jure Belli ac Pacis*, book ii, chap. iv, ss. 1 and 9; Vattel, *Le Droit des gens*, book ii, chap. xi, ss. 147 and 149; Phillimore, *Commentaries upon International Law*, vol. i (3rd ed., 1879), pp. 361–2; Wheaton, *Elements of International Law* (Dana's ed., 1866), s. 164; Lawrence, *The Principles of International Law* (4th ed., 1910), s. 78; Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926), p. 178; Oppenheim, op. cit., vol. i, p. 526; Fauchille, *Traité de droit international public*, vol. i, part ii (8th ed., 1925), p. 757; Verykios, op. cit., p. 25.

[2] Op. cit., book ii, chap. iv, s. 7.

[3] Op. cit., book ii, chap. xi, s. 140.

[4] Ortolan, *Des Moyens d'acquérir le domaine international* (1851), s. 200.

[5] *British and Foreign State Papers* (referred to subsequently as *B.F.S.P.*), 88, p. 1288. See also to the same effect Sörensen, *Nordisk Tidsskrift for International Ret* (1932), p. 243.

[6] Heffter, *Le Droit international de l'Europe* (4th ed., by Geffcken, 1883), s. 12.

[7] de Martens, *Traité de droit international* (translated by Léo, 1883), pp. 460–1.

[8] Rivier, *Principes du droit des gens* (1896), vol. i, pp. 182–3.

writers could not bring themselves to admit the existence of prescription as a rule of international law was that they paid too much attention to detail and insufficient attention to principle. For them it was an insuperable objection that no fixed time was laid down by international law within which a title by prescription could be established.[1] The falsity of this argument has been pointed out by Phillimore[2] and Fauchille. To argue thus is, as Fauchille says, to confuse 'le droit de prescription' with 'la loi de la prescription', in other words to confuse principle with technical application. If the latter, so far as international law is concerned, 'ne peut être déterminée d'une manière uniforme', the principle nevertheless is 'inhérent à la nature des choses et essentiel à l'existence des sociétés'.[3] In the same manner Professor Lauterpacht argues that the lack of a fixed period of time for the operation of the doctrine of acquisitive prescription in international law is no more fatal to that doctrine than is the absence of a settled rule regulating the rate of interest fatal to the principle that interest may be awarded in international law.[4]

If, then, it has been concluded that, according to the majority view, the doctrine of 'acquisitive prescription' exists in international law, it remains to be seen what is meant by this doctrine, both as propounded by the writers and as developed in arbitrations between states.

Acquisitive prescription—the views of the writers

As has already been stated, confusion exists because, apart from the difference between 'extinctive prescription' and 'acquisitive prescription', there appear to exist—or at any rate the majority of writers indicate that there exist—in international law two kinds of 'acquisitive prescription'.

In the first instance, there is a form of 'acquisitive prescription' based, it is said, on 'immemorial possession'. The postulate of this form of prescription is that a state of affairs exists, the origin of which is uncertain. It is impossible to prove whether the origin of this state of affairs is legal or illegal. It is therefore presumed to be legal. 'Omnia praesumuntur rite esse acta.' Secondly, there is a form of 'acquisitive prescription' more akin to the *usucapio* of Roman law. The conditions for the operation of *usucapio* in Roman law were: (*a*) A thing susceptible of ownership (*res habilis*); (*b*) A title of some kind (*justus titulus*), such as a sale, gift, or legacy, albeit a defective title; (*c*) Good faith (*fides*); (*d*) Possession (*possessio*), implying physical control (*corpus*) and the intention to possess as owner (*animus*); (*e*) The possession must be uninterrupted for a period of time defined by law (*tempus*). Interruption of possession was known as *usurpatio* and was fatal to the acquisition of title by *usucapio*.[1]

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[1] Heffter, op. cit., s. 12, n. 3 by Geffcken.

[2] Op. cit., vol. i, pp. 363–5.

[3] Op. cit., vol. i, part ii, p. 755.

[4] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 117, n. 4.

The theory underlying *usucapio* is very different from that underlying prescription based on 'immemorial possession'. In the case of *usucapio* it is admitted that the title was originally defective, but possession, it is said, cures the fault. In the interests of the stability of society the law must draw a line somewhere and under reasonable conditions lend its sanction to the state of affairs that already exists in fact. *Interest reipublicae ut sit finis litium; ne dominia rerum diutius in incert essento.*

There are strong grounds for holding that both these forms of 'acquisitive prescription' exist in international law. Indeed the existence of 'immemorial possession' as a doctrine of international law is not denied at all. F. de Martens, one of the writers who disputes the existence of 'acquisitive prescription' in international law, nevertheless says: 'Le fait accompli, couvert par une antiquité immémoriale, devient légitime devant le droit international.'[2] Rivier, who definitely denies that 'acquisitive prescription' exists in international law, cites F. de Martens with approval and has no doubt that 'l'état actuel de l'Europe repose en grande partie sur la possession immémoriale'.[3] In effect, what F. de Martens and Rivier really deny is not that 'immemorial possession' is a form of title but that it is a form of 'acquisitive prescription'. Titles that rest on this basis, it is said, cannot be held to have been 'acquired' but merely 'consecrated'. There is force in the argument and, if the argument were accepted, it would mean that there would be three kinds of prescription, namely (i) Extinctive prescription; (ii) Immemorial prescription; (iii) Acquisitive prescription.

The position would then be that, whereas the majority of writers may be considered to accept all three kinds of prescription, writers of the standing of F. de Martens and Rivier could only be regarded as having accepted the first two kinds.

It is believed, however, that for purposes of analysis it is more accurate to accept only two main categories of prescription, namely: (i) Extinctive prescription; (ii) Acquisitive prescription, and then to subdivide acquisitive prescription into (*a*) Immemorial possession; (*b*) A form of prescription akin to *usucapio*. In the case of (*b*) there is no doubt that a valid title is 'acquired' where one did not exist before. In the case of (*a*) it is possible that a valid title did exist originally. On the other hand, it is equally possible that it did not and, even if it did exist, it is impossible to prove its existence. So it is not illogical or superfluous to say that a title is 'acquired' under this form of prescription. Thus de Louter, who is another of the authors who reject *usucapio*, nevertheless accepts 'immemorial possession' as a rule of international law, and does not consider that violence is done to logic by classifying it as a mode of 'acquiring' territory.[1]

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[1] Lee, *Elements of Roman Law* (1946 ed.), pp. 116–19.

[2] Op. cit., vol. i, p. 461.

[3] Op. cit., vol. i, p. 183.

In any case, from the point of view of international law, the interesting question is not so much whether 'immemorial possession', which undoubtedly constitutes a valid source of title in international law, is a form of 'acquisitive prescription' or not—this after all is a comparatively minor question—but whether that form of 'acquisitive prescription' which presupposes an originally defective title but which relies on possession for a reasonable period of time to cure the defect, or in other words that form of prescription which is akin to *usucapio* (*prescription proprement dite*, as some authors call it), is a recognized doctrine of international law.

According to Oppenheim, 'Grotius rejected the usucaption of the Roman Law, yet adopted from the same law *immemorial* prescription for the Law of Nations'. Other writers, however, he says, 'go beyond Grotius and his followers, and do not require possession from time *immemorial*, but teach that an undisturbed continuous possession can under certain conditions produce a title for the possessor, if the possession has lasted for some length of time'.[2] This passage is a good illustration of the uncertainty to which this branch of the law is subject, although it does indicate clearly that there are two kinds of prescription in international law other than 'extinctive prescription' and that Grotius rejected one and accepted the other. Grotius could not accept *usucapio* in international law because 'this right is introduced by the Civil Law (not by Natural Law), for time, of its own nature, has no effective power; for nothing is done by time, though everything is done in time'.[3] However, he did say that 'since time beyond the memory of man is morally, as it were infinite, a silence for such a time will always suffice to establish derelict, except there are very strong reasons on the other side'. And then he argued that 'time beyond the memory of man' was not very different from a century 'because the common term of human life is a hundred years, which period commonly includes three generations of men'.[4] From this he proceeded to say that 'a possession going beyond memory uninterrupted, and not accompanied with any appeal to justice, absolutely transfers ownership. It is credible that nations have agreed upon this, since such a rule tends greatly to peace'.[5]

For Vattel the position was different because he accepted both 'la prescription immémoriale . . . fondée sur une possession immémoriale' and

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[1] de Louter, *Le Droit international public positif*, vol. i (1920), p. 341. Verykios too distinguishes between *prescription immémoriale* and *prescription proprement dite* but he regards them both as forms of 'acquisitive prescription'. He stresses, however, that the existence of 'immemorial prescription' is undisputed and, therefore, that there is no need to discuss it at length (Verykios, op. cit., p. 76). But this does not mean that this form of prescription is not important.

[2] Op. cit., vol. i, p. 526.

[3] Op. cit., book ii, chap. iv, s. 1.

[4] Op. cit., book ii, chap. iv, s. 7.

[5] Op. cit., book ii, chap. iv, s. 9.

usucapio, which he defined as 'l'acquisition du domaine, fondée sur une longue possession non interrompue et non contestée' as part of the Natural Law, and therefore as part of the Law of Nations. He admitted that the Natural Law could not in general define the period of time required for the operation of *usucapio*, but this could be done by treaty or by custom.[1] Hall also pointed to the existence of two types of prescription. 'Title by prescription', he said, 'arises out of a long-continued possession, where no original source of proprietary right can be shown to exist, or where possession in the first instance being wrongful, the legitimate proprietor has neglected to assert his right or has been unable to do so.'[2]

This brings us up against another difficulty. As we have just seen, the second form of acquisitive prescription to which Hall was referring was a case of 'possession in the first instance being wrongful'. Yet, as was also explained earlier, *usucapio*, to which we have been likening this form of prescription, required good faith (*fides*). According to Vattel: 'Le droit d'*usucapio* signifie proprement que le possesseur de bonne foi n'est point obligé, après une longue et paisible possession, de mettre sa proprieté en compromis.'[3] Good faith was a requisite in international law no less than in private law, although, in the absence of contrary evidence, Vattel was prepared to assume good faith.[4] But, if the doctrine of acquisitive prescription was as necessary as most authors said it was in the interests of international order and stability, it was hardly to be supposed that the requirement of good faith would be maintained. Hall, comparing acquisitive prescription in international law with the same doctrine in private law, expressed this view bluntly when he wrote: 'While under the conditions of civil life it is possible so to regulate its operation as to render it the handmaid of justice, it must be frankly recognized that internationally it is allowed for the sake of interests which have hitherto been looked upon as supreme, to lend itself as a sanction for wrong, when wrong has shown itself strong enough not only to triumph for a moment but to establish itself permanently and solidly.'[5]

Oppenheim also recognized that in international law there is no necessity for good faith,[6] whilst Fauchille said that, at any rate in inhabited portions of the globe, 'la prescription aura presque toujours à sa base un acte de violence'.[7]

Despite the fact that the doctrine of acquisitive prescription in international law, unlike *usucapio* in Roman law, postulates no requirement of good faith, it is submitted that it would be a mistake to say that the notion of *usucapio* has no place in international law at all. The work of the authors is shot through with references to *usucapio* and the notion has clearly exercised a considerable influence on international law. Even in Roman law itself there were instances of *usucapio* where good faith was not required.[1] Nor is it a fact that international law entirely ignores the difference between good faith and bad faith. According to Verykios, the difference may be of some consequence—at any rate with regard to uninhabited territories—in that it may affect the period of time required for establishing a title by prescription, even though it is otherwise unimportant.[2]

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[1] Op. cit., book ii, chap. xi.

[2] Hall, *A Treatise on International Law* (8th ed., by Pearce Higgins, 1924), p. 143. See also Westlake, *International Law*, part i (1904), pp. 92–94.

[3] Op. cit., book ii, chap. xi, s. 141.

[4] Op. cit., book ii, chap. xi, s. 150.

[5] Op. cit., pp. 143–4.

[6] Op. cit., vol. i, pp. 526–7. See also Lindley, op. cit., p. 178.

[7] Op. cit., vol. i, part ii, p. 758.

It has thus been shown that, quite apart from the basic distinction between 'acquisitive prescription' and 'extinctive prescription', there is considerable uncertainty as to the meaning of 'acquisitive prescription' itself. No attempt will be made here to define 'acquisitive prescription'. That must await, first, consideration of some of the leading cases on the subject of acquisitive prescription; secondly, consideration of the status of acquisitive prescription as a rule of international law; thirdly, a discussion of the conditions necessary for the operation of the doctrine of acquisitive prescription in international law; fourthly, a discussion of certain differences between 'acquisitive prescription' and occupation. For the time being it is necessary only to point out that, whereas it is theoretically possible to enumerate four different types of prescription, namely (i) Extinctive prescription, (ii) Immemorial prescription, (iii) Acquisitive prescription under conditions of good faith, (iv) Acquisitive prescription under conditions of bad faith, it is considered to be a more accurate presentation of international law, for reasons already given, to distinguish between (i) Extinctive prescription and (ii) Acquisitive prescription, and then to subdivide acquisitive prescription into (*a*) Immemorial possession, (*b*) Acquisitive prescription akin to *usucapio*, and finally—although this is hardly ever necessary—to subdivide *usucapio* into (A) *Usucapio* under conditions of good faith, (B) *Usucapio* under conditions of bad faith.

It is important to remember, however, that these sub-classifications are for purposes of analysis only and that it is possible to give a single comprehensive definition of 'acquisitive prescription'.[3] For if it is clear that two main types of acquisitive prescription, namely 'immemorial possession' and *usucapio*, can be distinguished in international law, it is equally clear that there is a recurring tendency to confuse the distinction. The reason is not far to seek. 'Immemorial possession' is not by itself sufficient to discharge the very purpose for which prescription exists at all in international law. That purpose is, as we have seen, the maintenance of international order and stability. Yet there are few, very few, titles of which it can be said that they have lasted for so long 'qu'il est impossible de fournir la preuve d'une situation différente et qu'aucune personne ne se souvient d'en avoir entendu parler'.[1]

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[1] For example, *usucapio pro herede*. It seems that under the Twelve Tables good faith was not required for *usucapio*. See Girard, *Manuel élémentaire de droit romain* (5th ed. 1911), pp. 304–6.

[2] As a general rule, Verykios argued, good faith was not a necessary condition for claiming title by prescription in international law. 'A quoi bon exiger une telle condition en droit international, alors qu'elle ne sera jamais remplie? car nous prétendons que, spécialement pour les territoires habités, l'État possesseur sera toujours de mauvaise foi' (op. cit., pp. 74–75). But see ibid., pp. 80–81, as to uninhabited territories.

[3] Below, pp. 353–4.

The same problem of the inability of titles to meet this criterion of 'immemorial possession' arose in the Common Law. The original requirement was that a claimant seeking to establish an easement must show enjoyment of it 'during the time whereof the memory of man runneth not to the contrary'.[2] The impossibility of literally fulfilling such a requirement led to the fixing of the period at which legal memory was said to have begun at 1189. Even this proved much too strict a requirement with the result that the courts came to accept proof of enjoyment from as far back as living witnesses can speak.[3] In fact, a lifetime came to be sufficient.[4] As Littledale J. put it in *Bailey* v. *Appleyard*:[5] 'Under the old system, where enjoyment for time immemorial was required to substantiate a right of pasture, and of course could never be made out strictly, enjoyment for a period of 28 years, which appears to have been had in this case, might have been sufficient for founding thereupon a presumption of the right.'

This example shows how, even in municipal law, where the necessity for a doctrine of acquisitive prescription is not so overriding as it is in international law, a doctrine based on 'immemorial possession', literally interpreted, is quite impracticable. Such a doctrine inevitably moves towards the opposite system of *usucapio*, which presupposes a fixed or at any rate a shorter period of time. So that it can hardly be disputed that Verykios is right when he says that the only real difference between *prescription immémoriale* and *prescription proprement dite* is that a longer period of time is required for the former than for the latter, but that this is a difference of degree rather than of kind.[6] In other words there is really only one kind of

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[1] See the definition of 'immemorial possession' by the tribunal in the arbitration between Austria and Hungary concerning certain lakes in Galicia (1902). *Revue de droit international et de législation comparée* (Deuxième Série), 8 (1906), p. 207.

[2] Co. Litt. 114*b*.

[3] *First Report of Real Property Commission* (1829), p. 51. See also the judgment of Cockburn C.J. in *Bryant* v. *Foot* (1867), L.R. 2 Q.B. 161, at pp. 180–1.

[4] Grotius, dealing with the same problem, put the period as a century (three generations). Above, p. 336.

[5] (1838), 8 A. and E. 161, at p. 166.

[6] See the criticism by Verykios of those authors who exaggerate this difference in order to show that *possession immémoriale* is not really prescription and that *prescription proprement dite* does not exist at all in international law (op. cit., pp. 44–45).

'acquisitive prescription' in international law, the precise application of the doctrine varying in different circumstances.

Some leading cases on acquisitive prescription

Having given this preliminary survey both of the reasons for and of the meaning of the doctrine of acquisitive prescription in international law, it is desirable at this point to forsake the speculations of the writers for authority taken more directly from the practice of states and other agencies higher in the hierarchy of the law-determining agencies of international law than 'the teachings of the most highly qualified publicists'.[1]

One of the best-known instances of the recognition by states of acquisitive prescription as part of international law occurred in 1897, when Great Britain and the United States signed a treaty with a view to having the British Guiana–Venezuela Boundary dispute settled by arbitration. Article IV (*a*) of this treaty stated: 'Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.' Unfortunately the actual Award in this Arbitration, given in 1899, added little to the law of prescription.[2]

A comparatively straightforward issue of acquisitive prescription arose in the *Chamizal* Arbitration[3] between the United States and Mexico in 1910–11. The two Governments were disputing the ownership of the Chamizal tract. This tract, which lay between the old bed of the Rio Grande and its present bed, had been formed by the action of the water upon the banks of the river, causing the river to move southward into Mexican territory. The United States claimed title to the tract, *inter alia*, on the grounds of prescription, i.e. undisturbed, uninterrupted, and unchallenged possession of the territory since the Treaty of 1848, which constituted the Rio Grande as the boundary-line between the two countries. The arbitrators E. La Fleur (Canada), Anson Mills (United States), and F. B. Puga (Mexico) were unanimous in holding, on this point, that the claim of the United States failed. The reason for the failure was simply that on the facts the possession had not been 'undisturbed, uninterrupted and unchallenged'.

The Award is otherwise chiefly interesting for demonstrating the kind of action that the state, against which a prescriptive claim is being made, is required to take in order to prevent such a claim from being successful, as well as the kind of action that this state is not obliged to take. A convention had been signed in 1884 between Mexico and the United States, and this convention was an attempt 'to fix the rights of the two nations with regard to the changes brought about by the action of the waters of the Rio Grande'.[1] 'The very existence of that convention', the Commissioners went on, 'precludes the United States from acquiring prescription against the terms of their title.'[2]

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[1] See Art. 38 (i) (*d*) of the Statute of the International Court of Justice.

[2] For an account of this arbitration see Lindley, op. cit., pp. 152–7. See also, for the diplomatic correspondence preceding the arbitration, *B.F.S.P.*, 87, pp. 1061–1107, and ibid., 88, pp. 1242–1327; for the arbitration treaty ibid., 89, pp. 57–65 and for the award ibid., 92, pp. 160–2.

[3] *American Journal of International Law* (referred to subsequently as *A.J.I.L.*), 5 (1911), pp. 782–833.

'Another characteristic of possession serving as a foundation for prescription', the Commission continued, 'is that it should be peaceable.'[3] But if the state against which the prescriptive claim is being made, while making diplomatic protests from time to time, nevertheless desists from action which might lead to violence, such action cannot be held against it. Thus, evidence was given that in 1874 or 1875 the Mexicans had desired to establish a customs post in the tract. From the circumstances it was clear that, had they done so, this 'would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence'.[4]

The Commission proceeded to indicate that diplomatic protests were at that time the normal measures by which a prescriptive title could be prevented from arising, but also expressed its hope that a more satisfactory system would be instituted whereby the standard method under international law of interrupting the peaceful possession required for establishing a prescriptive title would be assimilated to the method already principally in use in private law, namely the lawsuit. As the Commission said: 'In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose.'[5]

To-day, apart from making diplomatic protests and offering to bring the matter before the International Court of Justice by way of Special Agreement, the proper course would be, at any rate so far as states parties to Article 36 of the Statute of the Court are concerned, to file an Application under Article 40 of the Statute. There can be no doubt that the establishment, first of the League of Nations and the Permanent Court of International Justice, and later of the United Nations and the International Court of Justice, has considerably modified the old practice whereby the somewhat crude and ineffective method of the diplomatic protest was the only method, short of war, of interrupting peaceful possession. The existence of a council and of a court for settling international disputes has relegated the diplomatic protest to the background in this connexion, whereas war is now definitely outlawed. The position now is that, if the matter is a proper one for determination by the Security Council or the International Court of Justice, failure to bring the matter before the Council or to attempt to bring it before the Court must be presumed to amount to aquiescence, even if, for propaganda purposes or other reasons, 'paper protests' are still made from time to time.[1]

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[1] *A.J.I.L.*, 5 (1911), p. 806.

[2] Ibid.

[3] Ibid., pp. 806–7.

[4] Ibid., p. 807.

[5] Ibid. This question was discussed at some length by Verykios. He considered that there were four methods by which one state may prevent another from acquiring a title by prescription. These were (i) Making a diplomatic protest; (ii) Bringing the matter before an international tribunal; (iii) Bringing the matter before the League of Nations; (iv) Making war (Verykios, op. cit., pp. 99–109). Verykios regretted that the second method was not always available, but even so he insisted that the first method by itself was not effective indefinitely (p. 101).

The best-known international arbitration of all relating to prescription is the *Island of Palmas* case (1928).[2] The opinion of the sole arbitrator in this case, Professor Max Huber, has been generally recognized as authoritative, and the only ground on which it is possible to find fault with it is that, although it is laying down the main principles of the law of prescription, it does not expressly claim to be doing so.[3] In this case the arbitrator had to decide whether sovereignty over the Island of Palmas (or Miangas) belonged to the Netherlands or to the United States (as successor to Spain). The United States claim was based on discovery of the island by Spain and on contiguity to the Philippines. Rejecting both these grounds, the arbitrator found in favour of the Netherlands on the basis of: (i) Continuous and peaceful display of sovereignty by the Netherlands; (ii) Aquiescence by the United States.

The learned arbitrator did not state which of these grounds was the more important or whether one alone would have been sufficient. It must therefore be assumed that they were of equal significance. In the circumstances of the case, he did not require numerous instances of the exercise of sovereignty, but he did require a 'continuous and peaceful display' right up to the moment of the critical date (1898).[4]

Finally, it may be noted that the Supreme Court of the Unites States has acted upon precisely the same principles in deciding certain disputes between various states of the Union.[5]

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[1] Above, p. 341, n. 5.

[2] *A.J.I.L.*, 22 (1928), pp. 867–912.

[3] There is, however, an oblique reference to 'so-called prescription' (ibid., p. 909).

[4] The critical date always plays an important part in arbitrations which raise an issue of prescription. It may be defined as the date after which the actions of the parties cannot affect the legal situation. Thus if one of the parties pleads that it has protested against the exercise of sovereignty by the other party, protests made before the critical date are relevant to the issue whether a prescriptive title can be made out or not. Protests made after the critical date are irrelevant to that issue. The exact date of the critical date is a matter of fact which the tribunal has to determine.

[5] See primarily *Arkansas* v. *Tennessee* (310 U.S. 563 or *A.J.I.L.*, 35 (1940), p. 154). See also *Rhode Island* v. *Massachusetts*, 4 How 591, 639; *Indiana* v. *Kentucky*, 136 U.S. 489, 510; *Virginia* v. *Tennessee*, 148 U.S. 503, 523; *Louisiana* v. *Mississippi*, 202 U.S. 1, 53; *Maryland* v. *West Virginia*, 217 U.S. 1, 41–44; *Michigan* v. *Wisconsin*, 270 U.S. 295, 308; *Vermont* v. *New Hampshire*, 289 U.S. 593, 613. The other principal international arbitrations which have a bearing on

The status of acquisitive prescription as a rule of international law

Interesting as are the various reasons advanced by the writers for the existence of acquisitive prescription as a rule of international law, and interesting as are also their efforts and those of the arbitrators to define its terms, what is perhaps even more important since the formulation of the first Statute of the Permanent Court of International Justice is to know how prescription fits into the structure of the sources of international law enumerated in Article 38 of the Statute. Taking, for example, the Statute of the present International Court of Justice, is prescription based on 'international conventions' within the meaning of Article 38 (i) (*a*)? is it an 'international custom' within the meaning of Article 38 (i) (*b*)? or is it a 'general principle of law recognised by civilised nations' within the meaning of Article 38 (i) (*c*)? Verykios, the author of a monograph published in 1934, had little difficulty in showing that acquisitive prescription had no general basis in international conventions. As for customary law, he thought that there were grounds for holding that acquisitive prescription had become an international custom, but that the matter was not yet sufficiently certain. Acquisitive prescription was, however, without any doubt a 'general principle of law recognised by civilised nations', so far as the principle itself was concerned. On the other hand, it could not be said that details, such as the amount of time required for a prescriptive title to become effective, were in any way settled.[1] The lack, however, of such a regulation of detail is not sufficient to prevent acquisitive prescription from being considered as a rule of international law.[2]

Nothing has since happened to render obsolete this considered opinion of Verykios. Acquisitive prescription to-day is still a rule of international law through being a 'general principle of law recognised by civilised nations', although it may be that the day is nearer now when it will be possible to say, without risk of contradiction, that the doctrine is also part of international customary law.

Conditions for the operation of acquisitive prescription

On the basis of the authorities given above, it is now proposed to classify the conditions for the operation of the doctrine of acquisitive prescription—the conditions, that is, which must be satisfied before a prescriptive title can be established. This naturally is a field in which the writers

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the law relating to prescription are the *British Guiana Boundary* Arbitration between Great Britain and Brazil (1904), *B.F.S.P.*, 99, pp. 930–2; the *Grisbadarna* Arbitration between Sweden and Norway (1909), Scott's *Hague Court Reports* (1916), pp. 121–40; the *Walfisch Bay* Arbitration between Great Britain and Germany (1911), *B.F.S.P.*, 104, pp. 50–102; and the case concerning the *Legal Status of Eastern Greenland* (1933), *P.C.I.J. Reports*, Series A/B, No. 53. In some of these cases, however, the tribunals were as much concerned with the law of occupation as with the law of prescription. On this question, see below, pp. 348–53.

[1] Verykios, op. cit., pp. 40–55.

[2] Above, p. 334.

have been active, and fortunately it is also a field in which they have achieved a substantial degree of unanimity, based on general acceptance of the maxim *nec vi, nec clam, nec precario*. It is proposed to take as a basis the classification of Fauchille.

According to Fauchille, for acquisitive prescription to operate, the following conditions must be fulfilled.[1]

(i) *The possession of the prescribing state must be exercised* à titre de souverain

This means that a state cannot acquire a title by acquisitive prescription if, although administering a territory, it admits that the sovereignty over that territory belongs to another state. The reason for this is that the acquiescence of the other state, which is a *sine qua non* of acquisitive prescription, is lacking. Or to put it another way, the administering state is by its own admission estopped from claiming a prescriptive title to the territory. Thus, in the period following 1878, it was impossible for Great Britain to acquire title by prescription over Cyprus, because, by terms of the Anglo-Turkish treaty signed at Constantinople on 4 June 1878, Great Britain recognized the continuing sovereignty of the Sultan of Turkey over the island. Similarly, during the same period, it was impossible for Austria-Hungary to acquire title by prescription over Bosnia-Herzegovina because, under the Treaty of Berlin (13 July 1878), the sovereignty of the Turkish Sultan over those territories was recognized. For the same reason, as Fauchille points out, a protectorate, no matter how long it is exercised, can never be converted into a title by acquisitive prescription.[2] Another consequence of the principle that the possession of the prescribing state must be exercised *à titre de souverain* is that the state must base its claim upon its own acts. It was the 'continuous and peaceful display of State authority', not the acts of individual Dutchmen, that decided the *Island of Palmas* case in favour of the Netherlands. Similarly, in the case concerning the *Legal Status of Eastern Greenland*,[3] the Permanent Court of International Justice said 'a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon the continued display of authority, involves two elements each of which must be shown to exist: the intention and the will to act as sovereign, and some actual exercise or display of such authority'. As only a state can have 'the intention and the will to act as sovereign', it follows that the acts of authority relied upon must be those of the state as an international person, not those of mere individuals or even of subordinate divisions of the state.

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[1] A very similar classification is adopted by Audinet in an article entitled 'De la prescription acquisitive en droit international public', in *Revue générale de droit international public*, 3 (1896), pp. 313–25. These classifications are based on Art. 2229 of the French Civil Code, according to which: 'Pour pouvoir prescrire, il faut une possession continue et non interrompue, paisible, publique, non équivoque, et à titre de propriétaire.'

[2] Op. cit., vol. i, part ii, p. 760. See also Audinet, loc. cit., p. 323.

[3] Series A/B, No. 53, at pp. 45–46.

A further consequence of the requirement that the possession be exercised *à titre de souverain* is that it is not enough for the state to show proof of legislation regulating the affairs of its own nationals in the area concerned. A state may legislate for its own nationals anywhere in the world, whether in foreign countries or on the high seas, without any consequence affecting the status of those countries or of the high seas flowing from such legislation. It is only if the state has legislated for the territory as such, and this legislation has been acquiesced in by the other state or states concerned, that there has been an exercise of sovereign power sufficient to found a title to that territory on the basis of prescription. Verykios, while not disagreeing with the first condition of acquisitive prescription as described by Fauchille, nevertheless finds it superfluous. The requirement that possession must be exercised *à titre de souverain* he describes as 'absolument inutile, car ce n'est pas la possession pure et simple qui fonde la prescription, c'est l'exercice de la souveraineté territoriale; or, il est évident que l'exercice de la souveraineté territoriale se fait à titre de souverain, autrement on ne l'appellerait pas ainsi, mais occupation, mandat etc. . . . et, dans ce dernier cas, il est en principe impossible de prescrire, par l'application du principe général "nul ne peut prescrire contre son titre" '.[1]

(ii) *The possession must be peaceful and uninterrupted*

Although some writers, such as de Louter,[2] do not require the possession to be peaceful, in the *Island of Palmas* case Professor Huber referred to a 'continuous and peaceful display of State authority (so-called prescription)'. Also, in the *Chamizal* Arbitration, the Commissioners insisted that possession maintained in the teeth of constant opposition did not amount to prescription. Display of authority by the one party, acquiescence in that display by the other party—those are the *sine qua non* of acquisitive prescription. The principle that the possession must be peaceful is, in fact, scarcely in doubt; what is disputed is its application. One difficulty is that the writers and arbitrators have concentrated more on those facts that the prescribing state must prove in order to establish a title than on the action which the defendant state must take in order to prevent a title being claimed against it under the doctrine of acquisitive prescription. The problem is, in fact, two-sided and should be treated as such. To allow acquisitive prescription to operate in cases where possession has been maintained by force in the face of persistent and violent opposition would be contrary to the very purpose of the doctrine. On the other hand, the fact must be faced that, in traditional international law, naked conquest was recognized as a valid means of acquiring territory. To the extent that, under the Charter of the United Nations, aggressive war is illegal, the position is now different. Previously, however, the conquering state, however reprehensible its action, obtained a legal title; the defeated state, no matter how valiantly it had fought, was deprived of its rights. If then a state which fought in defence of its rights could yet lose them, *a fortiori* it follows that a state which did not so fight but which contented itself with making diplomatic protests, also lost them. Here an important distinction must be made. Acquisitive prescription did not operate in cases where possession was maintained by force; but it did operate in cases where the original act of taking possession was forcible, even if the subsequent possession was peaceful. For in such cases it could be held that there was the necessary subsequent acquiescence, and that, therefore, the purpose of the doctrine was not defeated. This was so even if the vanquished state continued to protest diplomatically, because protests of this kind were not sufficient to overcome the presumption of acquiescence. It is essential to understand the role of the diplomatic protest in this connexion. According to Verykios,[1] the value of the diplomatic protest lies in its drawing the attention of international public opinion to the question. It serves as a warning to the other state that its pretensions will not go unchallenged. But, as Verykios also said, a protest not followed up by other action becomes in time 'academic' and 'useless'. The other action that was formerly required was forceful opposition of some sort. Since 1919 it was, where possible, reference of the matter to the League of Nations or the Permanent Court of International Justice. Since 1945 it has been, where possible, reference of the matter to the United Nations or to the International Court of Justice. As has been said above, the advent of this new machinery for settling international disputes has largely altered the role of the protest in the matter of acquisitive prescription. The result is that the diplomatic protest is of reduced significance and is certainly not now the principal method of interrupting prescription. A protest since 1919 can be said to have amounted to no more than a temporary bar.[2]

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[1] Op. cit., p. 75.

[2] Op. cit., vol. i, p. 342.

How peaceful the possession must be, how soon protests cease to be of value and become 'academic', are matters of fact to be left to the determination of the tribunal concerned. Fauchille, for instance, argues that the possession of Alsace-Lorraine by Germany after 1871 was not sufficiently peaceful to allow prescription to operate.[3] This example is, however, not happily chosen, because Germany's right to Alsace-Lorraine was grounded in a treaty. It is one thing to allow opposition to prevent the establishment of a prescriptive title; it is quite another thing to invoke agitation as a reason for upsetting a state of things recognized by treaty.

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[1] See above, p. 341, n. 5.

[2] As Sörensen put it: 'A protest that leads to no subsequent result only has the effect of postponing the date of the final acquisition by prescription' (op. cit., p. 252).

[3] Fauchille, op. cit., vol. i, part ii, p. 761.

(iii) *The possession must be public*

The idea that clandestinity precludes prescription is common to all systems of law. It is often said that in international affairs clandestine possession of territory is hardly conceivable.[1] Although this may be so, it is essential to stress the importance of publicity as a condition of prescription. For acquisitive prescription does not operate solely in the sphere of the possession of territory properly so-called. By virtue of acquisitive prescription, as will be shown later, it is possible for a state to acquire not only a piece of territory at the expense of another state but also a number of rights at the expense of the international community. Publicity is essential because acquiescence is essential. For acquisitive prescription depends upon acquiescence, express or implied. Acquiescence is often implied, in the interests of international order, in cases where it does not genuinely exist; but without knowledge there can be no acquiescence at all.

(iv) *The possession must endure for a certain length of time*

Although there is a complete lack of agreement as to the time required for the establishment of a prescriptive title, this is not, as we have already stated,[2] a valid reason for rejecting acquisitive prescription as a rule of international law. Grotius favoured more than a hundred years;[3] Vattel referred to 'une longue possession non contestée;[4] F. de Martens[5] and Rivier[6] (as we have already seen) required 'immemorial possession'. The majority of writers conclude that the time varies with the facts of each case. According to Fauchille: 'L'opinion dominante est qu'en l'absence de loi positive il est impossible de fixer un délai: celui-ci doit varier dans chaque cas, avec les circonstances, c'est-à-dire selon la plus ou moins grande importance ou l'éloignement plus ou moins grand du territoire possédé, d'après la manière dont les actes de possession ont été pratiqués, suivant la position dans laquelle se trouvent les parties intéressées.'[7] Inconclusive though it may be, it is not possible to improve on this statement. The fixing of a fifty-year period by the treaty of 1897 in the British Guiana–Venezuela boundary dispute cannot be regarded as having laid down a general rule.

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[1] Verykios writes: 'On peut critiquer de même l'exigence de la publicité comme étant absolument inutile en droit international, où on ne peut concevoir une possession clandestine' (op. cit., p. 75).

[2] Above, p. 334.

[3] Op. cit., book ii, chap. iv, s. 7.

[4] Op. cit., book ii, chap. xi, s. 149.

[5] Op. cit., vol. i, p. 460.

[6] Op. cit., vol. i, pp. 182–3.

[7] Op. cit., vol. i, part ii, p. 762. Audinet arrives at a similar conclusion (op. cit., pp. 323–4).

While, therefore, the classification of Fauchille and Audinet of the conditions required for the operation of acquisitive prescription may be accepted as substantially accurate, it is also possible to agree with Verykios that the conditions required by these authors are unnecessarily repetitive. Verykios, for instance, would telescope the necessary conditions as follows: (*a*) 'Le silence[1] du véritable souverain, pendant un certain laps de temps assez long pour légitimer la possession du nouvel acquéreur.' (*b*) 'L'exercice effectif, continu et sans lacune de la souveraineté territoriale.'[2]

This conclusion, it must be admitted, has the advantage not only of being brief but also of formulating the basic conditions of acquisitive prescription in precisely the same way as Huber formulated them, albeit less explicitly, in the *Island of Palmas* case. It is to be preferred to the classification of Fauchille and Audinet; it also assists materially in the formation of a definition of 'acquisitive prescription'.

The distinction between 'acquisitive prescription' and occupation

One of the difficulties that arises from the natural reluctance of international tribunals, as indeed of all tribunals, to place their decisions into the neat classifications prepared for them by the text-writers is that of evaluating the precise legal effect of these decisions. This is particularly true of Professor Huber's Award in the *Island of Palmas* case and the decision in the no less important case that soon followed it, namely, the Judgment of the Permanent Court of International Justice in the case of the *Legal Status of Eastern Greenland*[3] in 1933. In an article[4] devoted to a comparison of these two cases Mr. (now Sir Eric) Beckett showed that, whereas the *Eastern Greenland* case was decided in favour of Denmark on the basis of occupation, the *Island of Palmas* case was decided in favour of the Netherlands on the basis of prescription. The fact that the learned author should devote a long article to this problem is proof enough that the *ratio decidendi* of these two cases is not easily determined.

While Sir Eric Beckett indeed admitted certain similarities between acquisitive prescription (henceforward referred to merely as prescription) and occupation—in particular with regard to the acts required to substantiate either form of title—the whole point of his article was to emphasize the difference between the two.[5] As the learned author pointed out, whereas occupation is a means of acquiring territory which is *res nullius*, prescription is a means of acquiring territory which is subject to the sovereignty of another state. Therefore, in order to establish a title by prescription as compared with establishing a title by occupation, the claimant state must show both a stricter proof of possession and a longer period of possession, because the essence of prescription is the acquiescence, express or implied, of the one state in the adverse possession of the other. Furthermore, as is also made clear in Sir Eric Beckett's article, whereas occupation is a means of acquiring sovereignty over land territory[1] only, prescription is a means whereby rights of a different kind may be acquired. Thus it is through prescription, and through prescription alone, that a state may acquire rights with regard to the actual waters of the high seas[2] in excess of those rights already conferred on it by conventional or customary international law.

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[1] It has already been shown that 'silence' is not normally interrupted by mere diplomatic protests otherwise than for a brief initial period. See above, p. 346.

[2] Verykios, op. cit., p. 75.

[3] Series A/B, No. 53.

[4] In *Hague Academy, Recueil des Cours,* vol. iv (1934), pp. 218–55.

[5] Sir Eric Beckett contrasted prescription with occupation as follows: 'La "prescription" ressemble à "l'occupation" en ce qu'elle est une manière d'acquérir un titre originaire à la souveraineté territoriale (par opposition aux titres dérivés), et aussi en ce qu'elle comporte les deux éléments de *l'animus* (intention de s'approprier) et du *factum* (possession et administration effective). Elle diffère de l'occupation en ce qu'elle est un moyen d'acquérir un territoire qui n'est pas *res nullius*, mais qui est placé sous la pleine souveraineté d'un autre État. Elle doit aussi

Only through prescription—a form of acquiring territory which, as we have seen, requires the acquiescence of other states—and not through occupation can a state establish a claim to a maritime belt wider than that allowed by general international law. Only through prescription—and therefore with the acquiescence of other states—can a state establish a claim to a system of delimiting its maritime belt different from that laid down by international law. Similarly, only through prescription—and therefore with the acquiescence of other states—can a state establish a claim to 'historic bays' or to 'historic waters' generally.[3] An interesting example illustrating these propositions occurred in 1863. Spain was claiming a maritime belt of six miles off the coast of Cuba. In a letter

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s'appliquer, à mon avis, à l'acquisition d'un territoire qui, bien que n'étant pas placé sous la pleine souveraineté d'un autre État, est soumis aux droits partiels ou incomplets d'un autre État, tel qu'un commencement de titre fondé sur la découverte et non suivi d'occupation. Il en est de même, selon moi, pour l'acquisition d'un territoire dont un État, autrefois manifestement le souverain, a perdu la possession ou le contrôle effectif (sans que son contrôle ait passé à quelque autre Puissance) et qu'il n'a pas abandonné, mais sur lequel il réclame au contraire la souveraineté. Par la prescription va être acquis un titre à l'encontre de l'ancien souverain (ou à l'encontre de l'État qui possède un commencement de souveraineté ou une souveraineté imparfaite), c'est-à-dire indépendamment de l'assentiment de celui-ci. Lorsqu'il s'agit d'un conflit relatif à l'acquisition par prescription, le débat se ramène à la question suivante: "A la date critique, le territoire appartenait-il à A ou à B?" Lorsqu'il s'agit d'un conflit relatif à l'acquisition par occupation la question, au contraire, est celle-ci: "A la date critique, le territoire était-il *res nullius* ou appartenait-il à A?" C'est pourquoi j'ai précédemment déclaré que dans l'*affaire de l'île de Palmas* le débat portait sur la prescription, et dans celle du *Groenland* sur l'occupation' (Beckett, loc. cit., p. 248). See also Audinet, op. cit., pp. 316–17.

[1] Land territory, however, includes the bed of the sea and the subsoil beneath the sea-bed, at any rate within the maritime belt. The juridical status of the sea-bed and the subsoil outside the maritime belt is uncertain. See below, pp. 352–3.

[2] As an example of the acquisition of such rights may be cited the case of 'historic bays' (e.g. *Direct U.S. Cable Co. Ltd.* v. *Anglo-American Telegraph Co. Ltd.* (1877), L.R. 2 App. Cas. 394), and indeed of 'historic waters' generally, and also a claim like that of Denmark, in the period before the Treaty of Copenhagen (1857), to levy tolls on vessels passing through the Great Belt and the Sound (Wheaton, op. cit., Dana's ed., s. 181).

[3] Gidel, *Le Droit international public de la mer* (1934), vol. iii, pp. 621–52.

dated 10 August 1863, addressed to Mr. Tassara, the Spanish Minister, Mr. Seward, American Secretary of State, after admitting that claims to a maritime belt of more than three miles were permissible in exceptional cases, went on to give his view of what constituted an exceptional case. 'A claim thus asserted and urged must necessarily be now respected and conceded by the United States, if it could be shown that on its being brought to their notice they had acquiesced in it, or that on its being brought to the notice of other Powers it had been so widely conceded by them as to imply a general recognition of it by the maritime Powers of the world.'[1] This passage states an important principle which, because it follows logically from the doctrinal basis of prescription, has found general acceptance. The letter states that, if the United States had acquiesced in the Spanish claim, then the claim would be valid *vis-à-vis* the United States, even if the other maritime Powers had not acquiesced in it. If, however, the United States had not made known its position and its acquiescence could not be implied, then the Spanish claim would not be good against the United States or against other Powers unless there had been 'a general recognition of it by the maritime Powers of the world'. In such circumstances, therefore, the conditions for establishing a prescriptive claim are similar to those required for establishing an international custom. There is, however, one important difference. When a customary rule is in process of growth, states observe the rule because they consider themselves obliged to do so: when, on the other hand, a state is establishing a prescriptive claim, other states acquiesce in that claim, not out of any sense of obligation, but of their own free will or merely out of disinterestedness. The attitude adopted by Mr. Seward is entirely supported by the leading text-writers on the subject, such as Fauchille,[2] and also by Gidel,[3] the leading authority on the law of the sea.

In a most important respect, however, the law of prescription with regard to the acquisition of rights over the waters of the high seas is on a different basis from the law of prescription governing the acquisition of sovereignty over areas of land. In both cases, as we have seen, there can be no prescriptive claim without the display of sovereignty for the necessary period, on the one hand, and without acquiescence in that display, on the other hand. The difference is that, when a state is building up a prescriptive claim to land territory, it is doing so by exercising its authority over the area at the expense of one other state only; when, however, a state is building up a prescriptive claim to sovereignty over the waters of the high seas, it is doing so by exercising its authority over the area at the expense of the entire community of states.[1] The result is the same: a title is obtained valid *adversus omnes*. But the actual process of establishing the claim is subject to the substantial difference that, whereas, in the case of land territory, it is open to one state only to make protests and take other steps to prevent the claim from becoming established, in the case of sea territory it is open to the entire community of states to protest and take these other steps. (The other steps referred to are, in cases where such a course is possible, to bring the matter before the United Nations or the International Court of Justice.) The burden of proof required to establish a prescriptive claim over sea territory is, therefore, correspondingly greater than the burden of proof required to establish a similar claim over land territory. That the burden of proof in regard to sea territory is not impossibly heavy is due to the principle that the acquiescence of states, whose maritime interests are not affected and are not likely to be affected by the display of sovereignty, can, after due time and with due safeguards, be implied. Acquiescence cannot, however, be implied in the case of states whose maritime interests are affected or are likely to be affected by such a display of sovereignty. It is not possible to lay down a general rule stating how many states must protest and how strongly they must protest in order to prevent the growth of a prescriptive claim over areas of the high seas, but at least the governing principle is clear—there must be 'a general recognition of it by the maritime Powers of the world'.[2]

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[1] Moore, *Digest*, vol. i, p. 710.

[2] Op. cit., vol. i, part ii, pp. 380–2.

[3] Op. cit., vol. iii, p. 651, where Gidel requires for historic waters the two conditions of *l'acquiescement international* and *l'usage prolongé*.

It has thus been shown that only through prescription can a state appropriate for the exclusive use of its own fishermen zones of sea which, under the general principles of international law, are properly high seas. According to one view the same is true of the so-called sedentary fisheries, i.e. fisheries that involve the use of pots placed on the sea-bed or the gathering of specimens actually attached to the sea-bed. Thus Gidel, for whom the freedom of the seas was such an overriding principle that he could not even bring himself to regard the sea-bed as a *res nullius* capable of occupation,[3] would only allow states to claim title to sedentary fisheries outside the maritime belt on a basis of prescription involving the acquiescence of other states. Sedentary fisheries for him were an exception to the primary rule of the freedom of the seas and states could only exercise jurisdiction over

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[1] The law with regard to the sea-bed and the subsoil outside the maritime belt is uncertain. See below, pp. 352–3.

[2] The nearest approach to a rule appears in the following passage from Gidel, in which he says that the 'geographical situation' of the protesting state is one of the factors that have to be taken into account: 'Il est particulièrement délicat de déterminer par des formules générales à quelles conditions doit répondre "l'usage" établi; il paraît impossible d'exiger ni que la reconnaissance de cet usage soit rigoureusement "universelle" ni qu'elle soit expresse. Une seule contestation émanant d'un seul État ne saurait infirmer un usage; les contestations ne peuvent d'autre part être placées toutes sur le même plan, sans distinction de leur nature, de la situation géographique ou autre de l'État dont elles émanent' (Gidel, op. cit., vol. iii, p. 634).

[3] Op. cit., vol. i, pp. 499–500.

them on certain conditions. 'Ces conditions se ramènent essentiellement à l'usage effectif et prolongé d'une partie de la haute mer aux fins de pêcheries sédentaires, sans que les autres États, et spécialement ceux qui pourraient du fait de leur situation géographique faire valoir des objections particulières, aient opposé à cet usage des protestations formelles et persistantes.'[1]

Similar considerations underlay an Opinion dated 18 July 1871, in which Sir Travers Twiss upheld on the basis of prescription the jurisdiction of the Bey of Tunis over certain sedentary fisheries more than three miles from the shore as well as British jurisdiction over the pearl fisheries more than twenty miles off Ceylon.[2] These fisheries, stated the British Counter-Case in the *Behring Sea* Arbitration (1893), 'have been treated from time immemorial by the successive rulers of the islands as subjects of property and jurisdiction and have been so regarded with the acquiescence of all other nations'.[3]

There is, therefore, considerable authority for the proposition that title to sedentary fisheries outside the maritime belt can only be acquired by prescription. On the other hand, in his report to the Institute of International Law in 1925, Sir Cecil Hurst argued that 'la condition juridique du sous-sol qui se trouve au-dessous du lit de la haute mer se rapproche du statut d'une *res nullius* en ce que le premier occupant peut s'assurer un titre qui sera bon contre tout le monde'.[4] And, Sir Cecil Hurst continued, 'On peut admettre la même chose pour la surface du lit de la haute mer'.[5] Furthermore, according to Oppenheim[6] the sea-bed as well as the subsoil is capable of occupation. This is also the view of H. A. Smith.[7]

In the present state of the authorities it is not possible to say precisely what is the juridical status of the sea-bed and the subsoil outside the maritime belt. The balance of opinion has, however, swung strongly against Gidel's theory and some experts have even gone to the opposite extreme of holding that at least those portions of the sea-bed and the subsoil which form part of the 'continental shelf' are not even *res nullius* but are 'subject to the exercise, by the littoral states, of control and jurisdiction for the purposes of their exploration and exploitation',[8] whilst the exercise of such control and jurisdiction is even said to be 'independent of the concept of occupation'.[1] There may be good reasons for holding this view *de lege ferenda*, but it is not difficult to show that the better view *de lege lata* is that the sea-bed and the subsoil outside the maritime belt are susceptible of occupation, even though it is possible that the right to occupy them may be exercised only by the littoral state.[2]

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[1] Gidel, op. cit., vol. i, pp. 500–1.

[2] Smith, *Great Britain and the Law of Nations*, vol. ii (1935), pp. 121–2.

[3] Ibid., p. 412.

[4] *Annuaire de l'Institut de Droit International* (1925), p. 160.

[5] Ibid. In his well-known article entitled 'Whose is the Bed of the Sea?', in this *Year Book*, 4 (1923–4), pp. 34–43, Sir Cecil Hurst did not define so clearly the exact status of the sea-bed. Although he spoke of title to sedentary fisheries being based on 'long-continued occupation', he seems to have had in mind occupation dating back as far as the period of *mare clausum* when the high seas themselves were the subject of occupation. In this eventuality, although the word 'occupation' is used, title to the sedentary fisheries is really based on prescription.

[6] Op. cit., vol. i (7th ed. by Lauterpacht (1948), pp. 575–8.

[7] Smith, *Great Britain and the Law of Nations*, vol. ii (1935), p. 122.

[8] See *Report of the International Law Commission covering its second session, 5 June–29 July 1950. General Assembly, Official Records: Fifth Session*, Supplement No. 12 (A/1316), p. 22.

If, then, it is correct that the waters of the high seas may not legally be occupied by any state, it follows that rights over such waters derogatory of the general rule of the freedom of the seas can be acquired only on the basis of prescription, involving, that is, a 'continuous and peaceful display of sovereignty' over the area of sea concerned accompanied by 'a general recognition of it by the maritime Powers of the world'. Correspondingly, if it is correct that the sea-bed and the subsoil, even outside the maritime belt, are at least susceptible of occupation (though the right to occupy them may be restricted to the littoral state), then it follows that the right of the littoral state to subject these submarine areas to its control and jurisdiction derives from the law of occupation. If, however, these submarine areas are so situated that the claims of various littoral states overlap, and that part of the sea-bed and its subsoil over which State A is claiming rights was formerly subject to the jurisdiction of State B, then a situation analogous to the *Island of Palmas* case would arise and State A could only make good its claim on the basis of prescription.

Definition of 'acquisitive prescription'

In the light of all the authorities cited above, it is now possible to define 'acquisitive prescription' as follows:

'Acquisitive prescription' is the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted, and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states (in the case of land territory the previous possessor, in the case of sea territory neighbouring states and other states whose maritime interests are affected) have acquiesced in this exercise of authority. Such acquiescence is implied in cases where the interested and affected states have failed within a reasonable time to refer the matter to the appropriate international organization or international tribunal or—exceptionally in cases where no such action was possible—have failed to manifest their opposition in a sufficiently positive manner through the instrumentality of diplomatic protests. The length of time required for the establishment of a prescriptive title on the one hand, and the extent of the action required to prevent the establishment of a prescriptive title on the other hand, are invariably matters of fact to be decided by the international tribunal before which the matter is eventually brought for adjudication.

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[1] See *Report of the International Law Commission covering its second session, 5 June-29 July 1950. General Assembly, Official Records: Fifth Session*, Supplement No. 12 (A/1316), p. 22.

[2] Hurst, 'Whose is the Bed of the Sea?', in this *Year Book*, 4 (1923–4), pp. 34–43. See also Hurst's report to the Institute of International Law in 1925 (*Annuaire de l'Institut de Droit International*, 1925, pp. 159–61).

SOME FOREIGN EFFECTS OF NATIONALIZATION OF PROPERTY

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I

Over twenty years ago a celebrated debate took place in the pages of this *Year Book*[1] on the expropriation of the property of aliens in international law. Since that time nationalization has extended its reach in many countries and issues arising have continued to come before the courts for decision, or have been settled by international agreement. The purpose of this article is to pick up and follow some of the threads in this intricate pattern of law and policy; in particular, to see how the courts of this country have dealt with foreign nationalization decrees, and how states enforce such rights as they may have in respect of their nationals whose property has been nationalized abroad.

It may be convenient to preface this article by some observations in the matter of terminology. Confiscation, liquidation, expropriation, and requisition, on the one hand, and nationalization and socialization on the other, are often applied to the various forms of state interference with private property in different—and sometimes overlapping and conflicting—senses. 'Confiscation', said Lord Ellenborough,[2] 'must be an act done in some way on the part of the government of the country where it takes place and in some way beneficial to that government, though the proceeds may not strictly speaking be brought into its treasury.' These prescient words are not, however, concerned with the legal character of confiscation. It seems that to confiscate property, that is, to divest the owner of his rights and interest in it without compensation, is to contradict the premisses on which any legal system must rest, in which private property has a part; it is a denial, in fact, of the right of property. Confiscation, then, is the taking of private property by the state without payment or compensation to the divested owner; where, however, payment or compensation is given, the taking may be called expropriation. In either case the property may after the taking be vested in the state or an agency of the state, that is to say, nationalized; or it may be redistributed to other private persons. Where the subject-matter is *res nullius*, it may of course be nationalized without confiscation or expropriation. The state may also take possession of private property for the time being, without or with payment for its use, and this may be called requisition; but the margin between requisition and expropriation is often a narrow one in practice, as, for example, in the case of ships requisitioned for war service.[1] Finally, the state may interfere with or restrict the use and disposal of private property by managerial direction; currency and payments control; import and export restrictions; control of the use of raw materials by licences or quotas; and other forms of *dirigisme*, which have been called 'creeping nationalization' by its opponents; or by what is called in the United States the exercise of the 'police power'. We are, however, concerned here mainly with nationalization, which is used to mean confiscation or expropriation of private property and its transfer to the state in the carrying out of national economic policy; it is not intended to cover the public seizure of property as a judicial penalty or in the common interest in time of war or national emergency.

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[1] Fachiri, 'Expropriation and International Law', in this *Year Book*, 6 (1925), p. 159; Fischer Williams, 'The Property of Aliens', ibid. 9 (1928), p. 1; Fachiri, 'International Law and Propert of Aliens', ibid. 10 (1929), p. 32.

[2] *Levin* v. *Allnutt* (1812), 15 East 269.

The term 'liquidation' has many meanings and has given much trouble. It has in particular to be distinguished, in the case of companies, from dissolution, or the final extinction of the corporate entity, and, as will be seen, the question may arise whether a nationalization decree merely puts a company into liquidation or actually extinguishes it.

Property nationalized by the state may either belong to one of its nationals, an individual or corporation, and be situated within its territory; or belong to an alien individual or corporation and be so situated; or belong to one of its nationals and be situated abroad. These kinds of property may for convenience be called local property of a national; local property of an alien; and foreign property of a national.

II

There are two main questions to be answered: What are the foreign effects of nationalization measures upon the foreign property of a national or of his successors in title? What international claims can arise in respect of the nationalized local property of an alien? The first is a matter largely for decision by municipal courts; the second largely for settlement by international agreement or arbitration. But they cannot be entirely separated in practice, and it seems best to consider them historically in the broad context of those nationalization measures with which the court decisions and state practice have actually had to deal.

Before the First World War cases of interference with private property by the state which had international effects were few and far between. It was not, of course, doubted that the state had a right to take property for the public use, or that it might have an original and exclusive title to certain kinds of property, such as mineral resources, within its territory. Monopolies also were sometimes established without compensation to the displaced entrepreneurs, for example, the tobacco monopoly in France in 1810; and when the French match monopoly was decreed in 1872 compensation was given, but as 'an act of grace', for the physical assets actually taken over. Similarly, in the United States the 'police power' was used to suppress or control by licensing such enterprises as the liquor trade, pool halls, and lotteries, no compensation being found for those put out of business. The few international claims arising, which were settled by agreement or arbitration, were those of the Sicilian Sulphur Monopoly, 1836; George Finlay, 1836–46 (seizure of land in Greece for the Royal benefit); Jonas King, 1853 (seizure of land in Greece by the Government there); Henry Savage, 1852 (confiscation of a stock of gunpowder in El Salvador); Delagoa Bay Railway Concession, 1903; Italian and Uruguayan Insurance Monopolies, 1911–20; Portuguese Religious Properties, 1913. These cases have been frequently cited and discussed,[1] and here it is enough to notice that they nearly all concern British or American nationals; that they were for the most part settled[2] by the application of standards based on freedom of contract, the sanctity of private property, and the duty of the state to compensate the owners of property taken for the public use; and that it is assumed in all of them that the assessment of compensation is a matter for an impartial body, preferably an arbitral tribunal, or, in the words of the United States Supreme Court: 'The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial.'[3]

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[1] Cf. *The Broadmayne*, [1916] P. 124, *per* Pickford L.J.: 'There is no particular magic in the word [requisition] itself; it does not connote the same state of things in every particular case.' A ship may be taken into state possession and control for operation by a state agency; or requisitioning may amount to little more than direction of movements by the state, the owners or charterers retaining possession and all commercial profits.

After 1917 the picture changes. The cardinal principle that the state may only take private property for value has been ignored in practice and disputed in theory and become increasingly harder for claimants to maintain. Agrarian reforms and the nationalization of mineral resources followed the Mexican revolution, and some of its effects will be considered below. But it is to the Russian revolutionary decrees that we must first turn.

Soviet policy had from the beginning certain social and economic objectives, which were held to justify the extinction of the great part of existing private property, in order to diminish and destroy those sources of power which before the revolution of 1917 were in private hands. Within a year the Russian Soviet Federated Socialist Republics had enacted a number of basic decrees,[1] which swept away the foundations of private ownership; auxiliary decrees followed, and in some cases nationalization was a process lasting for some time. For example, the decree of December 1917 established a People's Bank and made banking a state monopoly, all existing joint-stock banks and banking houses being 'amalgamated' with the People's Bank on the basis of 'complete confiscation' and all bank shares declared null and void, surrender of share certificates being required. In January 1920 the People's Bank was itself abolished and all its assets and liabilities transferred to the Central Budget and Accounts department of the Government.

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[1] See particularly Fachiri, loc. cit., in this *Year Book*, 10 (1929), p. 32; Whiteman, *Damages in International Law*, vol. ii, s.v.

[2] But British naval guns were brought to bear in the *Sicilian Sulphur Monopoly* case.

[3] *Monongahela Navigation Co.* v. *United States* (1893), 148 U.S. 312.

The Soviet Constitution has codified these principles and 'the line has been drawn beyond which the individual will not be permitted to accumulate wealth by engaging in private business activity. By drawing the line Soviet law-givers have indicated the strongpoints which private enterprise cannot be permitted to hold.'[2] Article 5 of the Constitution distinguishes between property of the whole nation and property of the kolkhozes and co-operative societies: the first is called state property and includes (Art. 6) the land and natural deposits on or under it; rail, air, and water transport; factories; banks; sovkhozes and machine and tractor stations; municipal enterprises; and the bulk of dwelling-houses in urban areas. Transfers of property against payment between the state and kolkhozes or the co-operative societies may take place, but outright sale of its property by the state is not, it seems, possible, the interest of a kolkhoz in the land worked by it being a kind of lease in perpetuity; however, the kolkhozes and co-operative societies own 'their inventory (living and otherwise) and products' (Art. 7). Private property has a small and humble corner left to it; it is (Art. 10) the ownership by the individual of income and savings, products of his labour; of a dwelling-house, and objects of household use and personal use, with rights of inheritance within these limits; further, Article 107 of the Criminal Code makes 'the purchase or resale by private persons, for gain, of agricultural produce or of any article of mass consumption' the offence of 'speculation'. The right of private property save of 'necessaries' has thus been destroyed, and the confiscatory origin of state property is clear: 'State property emerged originally by violent expropriation, nationalisation and confiscation—by coercive alienation of the property of the exploiters. On the other hand property of the co-operative–kolkhoz societies emerged from voluntary socialisation of the means of their members.'[3]

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[1] Confiscation of landed estates (November 1917, No. 1); State monopoly of banking (December 1917, No. 10); Confiscation of shipping interests (February 1918, No. 19); Prohibition of sale or lease of means of distribution (April 1918, No. 32); Confiscation of key industries (July 1918, No. 47); State monopoly of insurance (November 1918, No. 86).

[2] Hazard, 'Soviet Socialism and Private Enterprise', in *New York University Law Review*, 25 (1950), p. 533. Professor Hazard has made outstanding contributions to the study of the Soviet legal system.

[3] Vyshinskii, *The Law of the Soviet State* (1948), p. 191 and generally.

The early revolutionary measures were aimed especially at 'the exploitation by foreign capitalists',[1] and it is not surprising that the foreign Powers made a joint *démarche* in the hope of protecting their interests: 'The representatives at Petrograd of all the foreign powers declare that they consider the decrees relating to the repudiation of Russian State loans, the confiscation of property of all sorts and the analogous measures, as without effect in so far as their nationals are concerned, and . . . reserve the right to claim . . . from the Russian Government damages for all the losses which these decrees may entail for their nationals.' But little came of it.

On the other hand, the effect of Soviet nationalization upon the foreign property of Russian nationals, and particularly corporations, has been and still is a source of litigation. But before we approach the decisions a word of warning by a distinguished writer on Soviet law is in point:[2] 'Soviet Acts talk private law but do not mean it or do not mean it seriously. For intra Soviet relations Soviet commercial legislation means nothing more than a working instruction'[3] of a large employer to his various officers and managers. To treat such an instruction as inflexible law and to construe it with all the neatness which bourgeois canons have worked out for bourgeois legislative acts would mean according to Soviet standards almost idiotism.' The English courts have not been unaware of this conflict,[4] and have interpreted Soviet decrees with caution. It is partly for this reason and partly because evidence of the Soviet decrees was then incomplete and confused that the earlier decisions upon their foreign effects are unsatisfactory.

However, it was from the beginning laid down that full effect must be attributed to Soviet nationalization measures upon the local property of Russian nationals, so that the rights of the previous owner were to be regarded as extinguished and the title of the Soviet state or state agency recognized.[5] The fact that the title was acquired by acts of confiscation was by itself immaterial; and it makes no difference if the property is later brought to England by a successor in title, under Soviet law, of the Soviet state.[6] On the issue of confiscation, Scrutton L.J. in *Luther* v. *Sagor* commented dryly on the rates of income-tax, super-tax, and death duties in

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[1] *History of the All-Union Communist Party (Bolshevik)*, p. 205.

[2] Dobrin, 'À propos the Soviet Maritime Code', in *Law Quarterly Review*, 49 (1933), p. 249.

[3] It is of interest to note that the period of conscription service in the Soviet army was recently increased by *oral* instruction: see War Office report on the Soviet armed forces made public in, e.g., the *Manchester Guardian* newspaper, 19 March 1951, p. 5.

[4] So Maugham J. ([1933] Ch. 745, at p. 762): 'The framers of the decrees of 1917 and 1918 . . . were not troubled with justice theories. . . . The decrees were confiscatory in character. . . .' Cf. *First Russian Insurance Co.* v. *London and Lancashire Insurance Co.*, [1928] 1 Ch. 922: 'Those decrees and regulations would receive in the Courts of Soviet Russia whatever construction would appear to be most in accordance with the dictates of the revolutionary conscience.'

[5] *Luther* v. *Sagor*, [1921] 3 K.B. 532, *per* Bankes L.J.

[6] *Princess Paley Olga* v. *Weisz*, [1929] 1 K.B. 718.

England and thought that 'in any case' the Soviet decree in question was 'not so contrary to moral principle that the judges ought not to recognise it'; and he noted the inference to be drawn from *Central Control Board* v. *Cannon Brewery Co.*,[1] where it was said that 'an intention to take away the property of a subject without giving to him a legal right of compensation . . . is not to be imputed to the legislature unless that intention is expressed in unequivocal terms'. But his observations upon the confiscatory character of the Soviet decree were plainly *obiter*; and it is submitted that the Russian bank cases and other decisions concerned with the property of Russian nationals or branches of Russian corporations—being property situated in England at the time of nationalization—are likewise not decisions upon the legal character of confiscation itself, the remarks thereon being in fact *obiter dicta*. The real questions in issue in these cases were: What is the procedural status of the English branch of a Russian company dissolved by Soviet measures of nationalization? What must be done with the assets of the English branch and, in particular, can a winding-up order be made?

The almost interminable litigation to which these questions have given rise began with two cases in which the House of Lords had held,[2] tentatively in face of the obscurity of the evidence, that Soviet nationalization of the banks did not necessarily involve their extinction as legal persons capable of suit in England. In the *Mulhouse* case Viscount Cave L.C. said (at p. 123):

> 'It is not an agreeable task for a British court of justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign state of the assets of private persons "on the basis of complete confiscation." But the Soviet government has been recognized by Great Britain as the lawful government of Russia and [he cited *Luther* v. *Sagor*] its decrees must be treated by the courts of this country as binding as far as the jurisdiction of the Russian government extends';[3]

and again (at p. 129):

> 'Counsel for the defendants deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country; and it is therefore unnecessary to deal with this question.'

It was held that the corporate existence of the Bank had not been brought to an end so as to prevent it from proceeding in the English courts;[4] two years later the House of Lords held that a Russian insurance company had not ceased to exist, since the Soviet insurance decrees were no stronger than those directed at the banks, which had 'only stripped [the banking companies] of their assets and destroyed their goodwill . . . while at the same time they deprived the shareholders of their shares': *Employers' Liability Assurance Corporation* v. *Sedgwick, Collins & Co.*;[1] they survived as juristic persons at least capable of suit. But, in the light of new evidence and a better understanding of the purport and effect, under the Soviet régime, of the nationalization decrees, and, in the case of the banks, of the fact that they had not been registered, as required by the Soviet Civil Code of 1 January 1923, while their statutory foundation under Tsarist law had been removed, it was established by 1930 that Russian companies affected by the revolutionary decrees had long ceased to have any corporate existence for any purpose. So the Moscow Industrial Bank having ceased to exist under Soviet law and having no branch in England, judgment obtained against it by default was void and could not support a garnishee order: *Lazard Bros.* v. *Midland Bank*.[2] But at this time the precise date of extinction was still in dispute, partly because the expert witnesses before the Court could not agree on the relative effects of 'liquidation', by which was meant dissolution, and 'nationalization'. Two views were put forward: first, that the revolutionary decrees 'liquidated' the companies, nationalization being the later process of assemblage and disposal of their assets by the state; second, that the decrees reduced the assets into the possession and control of the state but that 'liquidation' did not supervene until the rearrangement of assets was complete. It now appears that the former view was correct, and Eve J. was able to find that one of the banks concerned had been finally dissolved not later than January 1918, the date of the second Soviet banking decree: *In re Russo-Asiatic Bank*.[3]

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[1] [1919] A.C. 744, at p. 752.

[2] *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; *Banque Internationale de Commerce de Petrograd* v. *Gukassov*, [1925] A.C. 150 (both decided on similar facts and grounds).

[3] As Sargant L.J. in *Sedgwick, Collins & Co.* v. *Rossia Insurance Co.*, [1926] 1 K.B. 1, said (at p. 15): 'Russian decrees cannot determine ownership of property locally situate in this country.' Cf. *Lecouturier* v. *Rey*, [1910] A.C. 262; *The Jupiter (No. 3)*, [1927] P. 127, 250.

[4] Lord Finlay went so far as to say that the English branch of a company might get in its assets even after the dissolution of the company in the country of its incorporation, but this *dictum* has not been followed.

The procedural status of the English branches of dissolved Russian companies and the proper method of disposing of their assets were step by step established. An action by the Russian and English Bank's branch in London was stayed on the ground that the bank no longer existed; but a winding-up order was made upon a petition of creditors under the Companies Act, 1929, Section 338.[4] Nevertheless, the winding-up order did not recreate the company as a legal person so as to become a party to the proceedings, which had already been terminated on the ground that it had ceased to exist.[5] But the Liquidator was entitled to bring actions in his official name for the purpose of getting in the assets, and the winding-up order operated to defeat any claim of the Crown to the assets as *bona vacantia.*[1]

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[1] [1927] A.C. 95.

[2] [1932] 1 K.B. 617; [1933] A.C. 289.

[3] [1934] Ch. 720.

[4] *Russian and English Bank* v. *Baring Bros.*, [1932] 1 Ch. 435; *In re Russian and English Bank*, ibid., p. 663. Cf. *In re Russian Bank for Foreign Trade*, [1933] Ch. 745, and *In re Tea Trading Company, K. & C. Popoff* (1933), W.N. 79 (winding-up order made in respect of a trading company).

[5] *Russian and English Bank* v. *Baring Bros.*, [1934] Ch. 276.

Further, Maugham J. pointed out that it was open to the Soviet Union to claim in the winding-up the assets of the English branch of a dissolved Russian company.[2] But it does not appear that the Soviet Union has ever done so, and therefore the question whether the dissolution of the parent company could give it a good title to the assets of the English branch has not been decided in the English courts, though the weight of judicial opinion seems to be against. There is, indeed, evidence that the Soviet Government never intended any extraterritorial effect for its nationalization decrees. Two administrative circulars to Soviet District Courts and missions abroad have been referred to in the courts both in this and in other countries; the first, issued in April 1922, declared that 'the régime of property rights established by the decrees of the Russian Soviet Power regulates property relations in the R.S.F.S.R. only'; and the second, of September 1923, provided that 'property rights of citizens of the R.S.F.S.R. which have to be enforced outside the boundaries of the U.S.S.R. are to be determined by the laws of the country where such rights are to be enforced'. Hill J. deduced from these circulars that 'the R.S.F.S.R. recognizes and enforces the general principle that the passing of chattels is governed by the law of the place where they are locally situate'.[3]

The decisive factor, then, was not the fact that the Soviet Government did not claim extraterritorial effect for their nationalization decrees, but that the assets of the English branches were situated in England.[4] So in regard to *choses* in action, Maugham J. pointed out that the Soviet decrees could not by 'a kind of statutory novation' bar the discharge by the London branch (of a dissolved Russian company) of a debt, if it sought to do so out of assets situated in England. By similar reasoning contracts of life insurance, which by their express terms were to be governed by Russian law, were held to have been discharged by the Soviet decree of November 1919 annulling life policies: *Perry* v. *Equitable Life Assurance Co.*[5]

We may conclude, then, from the Russian cases, first, that they do not lay down any clear rule that effect shall not be given to foreign nationalization decrees merely because they are confiscatory in character; secondly, that foreign nationalization decrees do not and cannot effect a transfer of property situated in England either because the authority of the foreign state is limited to territory under its jurisdiction or because any transfer of such property can only take place in accordance with the proper law of such a transfer (which in the Russian cases was the *lex situs* of the English assets). It is submitted that the latter explanation is more satisfactory: for it brings the cases within the rules of English private international law and also explains, as will be seen, such decisions as *Lorentzen* v. *Lydden*.

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[1] *Russian and English Bank* v. *Baring Bros.*, [1936] A.C. 405.

[2] *In re Russian Bank for Foreign Trade*, loc. cit. For further developments in the winding-up of English branches see *Banque des Marchands de Moscou* v. *Kindersley*, [1950] 2 A.E.R. 105, 549, and cases there cited.

[3] *The Jupiter* (*No. 3*), [1927] P. 127.

[4] *In re Russian Bank for Foreign Trade*, loc. cit.: 'If the debt was primarily recoverable in London I am of opinion that it was not affected by Soviet legislation (which could not either extinguish it or transfer it to the Soviet Republic) . . . even though it was due to a Russian subject at the date of the nationalisation decree.' Cf. *In re Russo-Asiatic Bank*, loc. cit. (cause of action for breach of contract to pay sterling in London was locally situated in England and could not be transferred or extinguished by Soviet decrees); *I. A. Wormin Luetchig & Huth Ltd.* v. *Cheshire & Co.* (this *Year Book*, 11 (1930), p. 230) (bearer bonds).

[5] (1930), 45 T.L.R. 468.

a The American decisions are in broad agreement,[1] though they go farther in the direction of treating confiscation as itself a ground for non-recognition of the foreign decree of nationalization;[2] and they give more weight to considerations of public policy. The decisions in *United States* v. *Belmont*[3] and *United States* v. *Pink*,[4] in which the earlier decisions on foreign nationalization decrees are cited and discussed, fall outside the main stream since they were rendered on the basis of the Litvinov Assignment of 1933, which being an international agreement concluded by the United States overrode all considerations of state public policy: in the result the United States obtained title to assets in the United States, which represented indebtedness of American nationals to Russian enterprises, confiscated and nationalized by the Soviet Government.[5] It may be possible to regard the *Belmont* decision as one which in fact applied the proper law of the transfer, this being the law of New York State, as the *lex situs* of the moneys deposited by the dissolved Russian corporation, but there being imported into this law the terms of the Litvinov Assignment of 1933 as having the constitutional force of a treaty.[6]

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[1] Cf. *Dougherty* v. *Equitable Life Assurance Co.* (New York Court of Appeals), *Annual Digest*, 1933–4, Case No. 28: 'Since recognition [viz. of the Soviet Government by the United States of America] the Soviet decrees became the law of Russia, governing the policies in question. . . . It cannot be against the public policy of this State to hold nationals to the contracts which they have made in their own country to be performed according to the laws of that country.'

[2] The principle of non-recognition is in fact embodied in the New York Civil Practice Act.

[3] (1936), 301 U.S. 324.

[4] (1942), 315 U.S. 203.

[5] The decisions have been criticized by such high authorities as Jessup (in *American Journal of International Law*, 36 (1942)) and Borchard (ibid., p. 275), by the latter in rather extravagant terms.

For similar effects of an intergovernmental agreement see that concluded on 25 May 1946 by Switzerland and the United States, United Kingdom, France, and other countries, which is a kind of nationalization by international agreement of German property in Switzerland: see Mann, 'German Property in Switzerland', in this *Year Book*, 23 (1946), p. 354.

[6] The critics of the decision argued that the 1933 Agreement was a mere executive agreement, which could not, like a treaty approved by the Senate, operate as the supreme law of the land so as to displace, for example, the rules of public policy of New York State. But the Litvinov Assignment was part of a general settlement, one of the terms of which was recognition of the Soviet Government by the United States; that the United States Government's act of recognition was binding on the Supreme Court was not disputed, and it therefore followed from the United States doctrine that recognition is a matter of political conditions and that the terms and conditions of the negotiation and the bargain which emerged were also binding upon the courts.

III

The racial legislation of the German Government after 1933, while plainly both confiscatory and penal in intent and effect, has not been often considered in the English courts, but in two reported cases there has been an emphatic refusal to execute against property situated in England the confiscation called for by the German decree. But before these cases are considered it is necessary to distinguish between confiscation which strikes at all property owners alike in the execution of national economic policy and that which discriminates against a particular group of property owners;[1] the second kind may be called penal, but the first cannot save in a very extended sense, and the real ground of the two decisions on German racial legislation seems to be that the decrees in question were not merely confiscation but were penal confiscation of Jewish property. In *Frankfurther* v. *W. L. Exner Ltd.*[2] the effect of Decree No. 80 enacted in Austria shortly after the Anschluss was under consideration; this decree appointed 'official administrators and control officers' of Jewish businesses among others, and one Schober was appointed administrator of the plaintiff's leather-goods business. Romer J. said: 'Our courts would recognize Schober's title to property in Austria acquired by virtue of the decree or his rights of control in relation to that property, conferred by that decree, even though such property was subsequently transferred over here'; but since the decree was 'indisputably confiscatory in character and operation' and also penalized the Jewish members of the community, it would, by analogy with but not directly following *Huntington* v. *Attrill*, not be enforced so far as concerns property 'which is and always has been within the jurisdiction'.[3] An even more direct case was that of the ex-King of Spain. In 1931 he was by a Spanish decree declared an outlaw and a traitor and all his property in Spain was confiscated for the benefit of the state; this penalty, imposed in express terms for treason, was held not to reach securities deposited to the ex-King's account in London. The decree no doubt deprived him of any right of action in Spain against the plaintiff Bank, his agent for the deposit, but as a penal decree it would be regarded in the English courts as having no operation outside Spain: *Banco de Vizcaya* v. *Don Alfonso de Borbon y Austria*.[4] It appeared that the Spanish decree did not purport to affect the plaintiff's rights outside Spain; but its penal character made it immaterial whether it was intended to have extraterritorial effect or not and for that reason Romer J. in *Frankfurther*'s case found it unnecessary to decide whether the Austrian decree was intended to have such effect, though he was inclined to think that it did. The converse proposition, that the Crown will not be deterred from seizing the property of an alien enemy in England by 'the fact that the exercise of this right might be regarded elsewhere as in the nature of a penal ordinance', was expressed by Younger L.J. in *In re Ferdinand, Ex-Tsar of Bulgaria*.[1] It is interesting to compare the approach of the Court of Appeal of Rome to identical facts concerning the ex-King of Spain, the Banco de Vizcaya having claimed securities deposited in Italy to its order as agent of the ex-King. By Article 7 of the Introductory Law to the Italian Civil Code movable property is governed by the national law of the owner; but the Spanish 'sentence' upon Alfonso was not regarded by the Court as 'Spanish law' for the purpose of that Article, either because it was not law, or at least private law, at all, or because it was a penal law with which Article 7 was not concerned. Thus by a rather circuitous route the Italian Court reached the same conclusion as the English Court.[2]

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[1] See Huber, Arbitrator, in *Claims in Spanish Morocco* (Great Britain–Spain), *Annual Digest*, 1923–4, Case No. 85.

[2] [1947] Ch. 629.

[3] See also *Novello & Co.* v. *Hinrichsen Edition* (Wynn Parry J.), noted in *Current Law*, 2 (1951), p. 305*a* (compulsory sale of a Jewish business under Nazi legislation held to be 'confiscatory and penal' and ineffective to pass any interest in an English copyright). This case might also be regarded as governed by *Kaufman* v. *Gerson*, [1904] 1 K.B. 591.

[4] [1935] 1 K.B. 140.

IV

The question whether a foreign government may itself obtain possession of property situated in England, upon the basis of a confiscatory decree, has not been decided in the English courts, though the effects of requisitioning decrees for this purpose have been considered in cases arising out of the Civil War in Spain of 1936–9. The Spanish Government had purported to requisition all ships registered at Bilbao, whether in Spanish or foreign ports or on the high seas at the time of the decree; but after Bilbao had fallen into the hands of the *de facto* Government of Franco, the Spanish Government sought possession of a ship so registered, which was lying in Scottish waters.[3] The Court of Session rejected the claim and gave, among others, two alternative reasons which are germane to the present discussion: first, the Spanish requisitioning decree could not give a possessory title to a vessel outside Spanish waters at the material times; secondly, if it were to be admitted that a government can effect the requisition of ships which are in the waters of another state, it can only do so if they are flying its flag and registered in territory under its control; since the Spanish Government had lost control of the port of registration to a recognized *de facto* Government, it could not make out a good possessory title to the ship. A distinction then appears between recognition and enforcement of title: (*a*) if a foreign government has possession and control of a ship or presumably any other chattel within the jurisdiction of British courts, they will not allow that possession to be disturbed, whether or not the foreign government is a party to proceedings *in rem*; and it does not appear to be material that possession is obtained through process of confiscation or requisition by decree in the foreign state,[1] though an attempt to obtain possession by force will not presumably be countenanced by the civil authorities or the courts.[2] In any event the foreign state must prove its title to ownership or possession, a mere assertion of right being not enough even where a claim of immunity in respect of the foreign state or of its property is made;[3] (*b*) if, however, the foreign government seeks to obtain possession or control of property situated in England by asking for an order of the court to that effect, the decision may it seems depend upon the character of the foreign law upon which the claim to possession rests. If the foreign state has acquired title by a decree of expropriation or requisition, an order for possession may be made: *Lorentzen* v. *Lydden*.[4] There were four distinguishing elements in this case: first, the Norwegian requisitioning decree provided for compensation to be paid for the use of requisitioned ships; second, the decree was expressed to have extraterritorial effect and indeed, since the Norwegian Government was about to leave Norway for exile, it could have little else; third, only Norwegian nationals were affected by the requisition of ships involved; fourth, English national policy, in common with that of Norway, urgently required the enforcement of the decree. It may be that it was quite simply the fourth element which motivated the decision. As the Turco-Greek Mixed Arbitral Tribunal said in 1928:

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[1] [1921] 1 Ch. 107, at p. 145.

[2] *Ex-King of Spain* v. *Banco de Vizcaya*, *Annual Digest*, 1935–7, Case No. 72; and cf. *Bollack* v. *S.G. pour favoriser etc. l'industrie en France* (Supreme Court of New York), ibid., 1941–2, Case No. 36 (personal and confiscatory decrees of the Vichy Government).

[3] *Government of the Republic of Spain* v. *National Bank of Scotland* (1939), S.C. 413.

> 'Requisition is the manifestation of the unilateral will of the authorities exercising their power to press into the service of the national defence all resources to be found in the country . . . it is sufficiently justified by the necessity occasioned by the war. By

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[1] *The Cristina* (1938), 54 T.L.R. 512; but doubts were expressed by Lords Maugham, Macmillan, and Thankerton whether this principle was to be observed in the case of property devoted by the foreign state to commercial use.

[2] But if possession is obtained by a ruse? *The Abodi Mendi*, [1939] P. 178.

[3] *Haile Selassie* v. *Cable and Wireless Ltd.* (*No. 1*) (1938), 54 T.L.R. 996, C.A.; *per* the Master of the Rolls: 'Where the property which is not proved or admitted to belong to or to be in the possession of a foreign sovereign or his agent, is in the possession of a third person and the plaintiff claims it from that third person and the issue in the action is whether or not the property belongs to the plaintiff or to the foreign sovereign, the very question to be decided is one which requires to be answered in favour of the sovereign's title before it can be asserted that the title is being questioned.' For the relationship between title to possession and claim of sovereign immunity see also *The Ramava* (Eire, High Court), *Annual Digest*, 1941–2, Case No. 20. The United States courts reached similar conclusions on cases arising out of the Spanish Civil War, holding that in order to establish a claim to immunity the foreign government must have actual possession of a ship (physical control by its recognized agents); but this possession need not have been obtained with the consent of the owner provided that possession is not taken by force in United States waters (on what constitutes 'possession' see *The Navemar* (1939), (*Annual Digest*, 1938–40, Case No. 68): see Preuss, 'State Immunity and the Requisition of Ships during the Spanish Civil War', in *American Journal of International Law*, 36 (1942), p. 37.

[4] [1942] 2 K.B. 202.

> attempting to place requisition in one of the categories of law created for a situation of an entirely different character, a juridical construction would be adopted which would violate the nature of the act in question. . . . The requisition no doubt creates a right for the benefit of the person injuriously affected by it, but this right is not in the nature of a contract.'[1]

This description of requisition may sufficiently explain the decision in *Lorentzen* v. *Lydden*, but the explanation is a desperate one.[2] But is it not possible to regard it as resting on the second of the alternative grounds set out in *Government of the Republic of Spain* v. *National Bank of Scotland*? That is to say, the Norwegian ships subject to requisition were flying the Norwegian flag and were registered in territory which was, as far as the English courts were concerned, under the *de jure* sovereignty of the Norwegian Crown and Government, which issued the decree. If the requisition be regarded as a mode of transfer giving possessory title, what was the proper law of the transfer? Surely Norwegian law as the *lex loci actus*: the ships were under the Norwegian flag, the shipowners Norwegian, the place of registration Norwegian, and the decree promulgated by the *de jure* Government of that place. So far from English law being excluded in favour of the foreign law, it is difficult to see why on principle English law should have anything to do with the matter: had the ships been lying in Norwegian waters at the time of the decree there would have been no question of the title of the curator appointed by the Norwegian Government; again, had he obtained possession of the ships in England, his possessory title would have been recognized. Why, then, should it not be enforced at his request in the English courts?[3]

The effect of a similar Netherlands decree upon property situated in New York was considered in *Anderson* v. *N. V. Transandine Handelmaatschappij*,[4] where the Court of Appeals affirmed an order vacating a warrant of attachment against property of the defendant company on the ground that it had passed to the state of the Netherlands by operation of the decree of 24 May 1940. The Court, *per* Lehman C.J., said:

> 'There can be no doubt that the decree of May 24, 1940, promulgated by the recognized government of the State of the Netherlands is part of the law of a friendly sovereign State of which the defendants are subjects and in which the defendants are domiciled, and that under such law title to the property described in the decree . . . is vested in the State of the Netherlands. By comity of nations, rights based upon[5] the

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[1] *Photiadis* v. *Turkish Government, Annual Digest*, 1929–30, Case No. 236.

[2] See Cheshire, *Private International Law* (3rd ed.), p. 184: 'Perhaps the true justification of the decision is to be found in the abnormal circumstances and the unprecedented exigencies of the period.'

[3] It is possible to regard ships as *sui generis* because of their quasi-territorial character: this influenced the United States Supreme Court in *The Navemar*, cited above, p. 366.

[4] See *Annual Digest*, 1941–2, Case No. 4.

[5] But where the foreign government does not comply with the law relating to requisition, no

law of a foreign State to intangible property, which has a situs in this State (*sc.* New York), are recognized and enforced by the courts of this State, unless such enforcement would offend the public policy of this State.'

It is submitted that the principle stated in the last sentence is equally applicable to the facts underlying *Lorentzen* v. *Lydden.*[1]

If, however, the foreign government seeking an order for possession in the courts pleads a confiscatory decree as giving it title and that decree is penal in effect, it seems that no order for possession will be made; but if the decree is not penal, that is to say, if it does not in terms impose a penalty or is not aimed at a specific group of property owners to the exclusion of others in similar circumstances, there does not appear to be any authority[2] or reason of principle against the view that an order for possession may be made.

V

We may now turn to state practice in the face of the nationalization of the property of aliens. The rule that, where a state confiscates the local property of an alien, the state of which he is a national may under international law demand compensation, is still generally accepted. Thus the Permanent Court of International Justice, interpreting the Geneva Convention of 1922 between Poland and Germany,[3] held that both according to the intention of the parties and on general principles of international law the treatment of German property must be that generally accorded to aliens and based upon respect for vested rights and that measures prohibited by treaty cannot become lawful by reason of the fact that the state applies them to its own nationals.[4] But what is the standard of compensation? In so far as confiscation of the property of an alien is a breach of international law, it appears that special damage must be proved, there

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order will be made: *The Lubrafol* (United States, Texas District Court), *Annual Digest*, 1941–2, Case No. 37.

[1] The Swedish Supreme Court in a decision of 16 June 1942 took the opposite view of the same decree, apparently holding that while this Norwegian requisitioning decree did not offend Swedish *ordre public*, it had no effect upon ships in Swedish waters at the time.

[2] The old cases of *Folliott* v. *Ogden* (1789), 126 E.R. 75, and *Barclay* v. *Russell* (1798), 30 E.R. 1087, were concerned with penal confiscation and expropriation respectively; while *Wolff* v. *Oxholm* (1817), 105 E.R. 1077, was concerned with the confiscation of a *chose* in action under what would now be called trading with the enemy legislation.

[3] Art. 6 provided: 'Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7–23 undertakings belonging to the category of major industries, including mineral deposits and rural estates. Except as provided in these clauses the property, rights, and interests of German nationals or companies controlled by German nationals may not be liquidated in Polish Upper Silesia.'

[4] *German Interests in Upper Silesia, P.C.I.J.*, Series A, No. 7. Cf. similar opinions in the *United States-Norway Shipping Arbitration, Annual Digest*, 1919–22, and *Spanish Zone of Morocco Claims* (Great Britain-Spain), ibid., 1923–4, Case No. 85. The rule is embodied in the Fifth Amendment to the United States Constitution, and this provision 'that private property shall not be taken for the public without just compensation establishes a standard for our government, which the Constitution does not make dependent upon the standards of other governments': *Russian Volunteer Fleet* v. *United States* (1932), 232 U.S. 481.

being no place for nominal[1] or exemplary damages; so compensation is limited to direct losses[2] and in the words of Kaeckenbeeck is 'an equitable alleviation of the economic sacrifices demanded'; at most it cannot exceed the market value fairly[3] determined. But where a state has expropriated and nationalized private property, can it plead that aliens have received not less favourable treatment than nationals, and is there a minimum standard below which such national treatment may not, when accorded to aliens, be allowed to fall? Since the minimum standard is 'a corollary of the socio-economic system based upon the inviolability of vested property rights and is linked to the capitalistic system of economy and to the legal system associated with capitalism',[4] it is in any case hard to maintain where that system is challenged or has been abandoned; and international agreements concluded in the past twenty years in settlement of claims arising out of measures of nationalization show that it is breaking down. Typical agreements will now be considered.

Article XXVII of the Mexican Constitution declared that the *dominio directo* of certain minerals, including coal-gas and petroleum, was vested in the nation and was inalienable and imprescriptible. These national resources were to be exploited only by government concession, it being a condition that the concessionaire should not, if foreign, invoke the diplomatic protection of his Government, on pain of forfeiture.[5] It also provided, however, that 'private property shall not be expropriated except for reasons of public utility and subject to indemnification'. The expropriation under these provisions of the property, rights, and interests in the Mexican petroleum resources of United States, British, and Dutch companies in March 1938 led to long negotiations and a number of agreements which are of interest for several reasons. First, Mr. Cordell Hull on behalf of the United States expressed with great force and clarity the traditional view that 'the taking of property without compensation is not expropriation. It is confiscation. It is no less confiscation because there may be an expressed intent to pay at some time in the future', and that 'the right to expropriate property is coupled with and conditioned on the obligation to make adequate, effective and prompt compensation'.[6] The Mexican Government made the no less interesting reply:[7]

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[1] See *Union Bridge Company* case (United States-Great Britain), 1926 Neilsen's Report, p. 371.

[2] *Chorzów Factory* (*Indemnity*) case, *P.C.I.J.*, Series A, No. 17.

[3] For example, 'open market' in the Coal Industry Nationalisation Act, 1946, s. 13 (4), does not mean a purely hypothetical market, free from contemporary restrictions imposed by law; these must be taken into account: *Priestman Collieries* v. *Northern District Valuation Board*, [1950] 2 A.E.R. 129.

[4] Doman, 'Postwar Nationalization of Foreign Property in Europe', in *Columbia Law Review*, 48 (1948), p. 1136.

[5] A form of Calvo clause.

[6] United States Notes to Mexico of 21 July 1938 and 3 April 1940.

[7] Mexican Note to the United States of 3 August 1938.

> 'There does not exist in international law any principle universally accepted by countries . . . that would render obligatory the giving of adequate compensation for expropriations of a general and impersonal character; that nevertheless an obligation to indemnify the owners of expropriated property did arise under Mexican law, which itself determined the time and manner of payment; and that social progress sought impartially as between national and alien, cannot be held up by the impossibility of paying immediately the value of the properties taken.'

It might of course be asked why, if the first proposition were true, compensation for aliens had been provided for by the general provisions of Mexican law; further, just as Mexican law could not be pleaded in extenuation of a breach of international law, so it could not be used to justify a mode of compensation which in fact rendered that compensation inadequate. So in the dispute which arose between Mexico and the United Kingdom over the expropriation of the Mexican Eagle Company's interests the Government of the United Kingdom said:

> 'If the doctrine were admitted that a government can first make the operation of foreign interests in its territories depend upon their incorporation under local law, and then plead such incorporation as the justification for rejecting foreign diplomatic intervention, it is clear that the means would never be wanting whereby foreign governments could be prevented from exercising their undoubted right under international law to protect the commercial interests of their nationals abroad'[1]—

that is to say, where the Mexican Government itself broke up the companies incorporated under its law, the foreign shareholders were still entitled to compensation. After many vicissitudes agreement[2] between Mexico and the United Kingdom was reached in 1946 that experts should be appointed to value the expropriated assets, taking into account claims and obligations of the companies concerned *vis-à-vis* the Mexican Government; and that compensation should be assessed in United States dollars, interest being payable upon it. The legal position was most carefully reserved in paragraph 19 of the Agreement, which provided that the Agreement was not to be regarded as in any respect a precedent for any future dispute, claim, or arbitration arising between the two Governments.

Since 1944 the tempo and extent of nationalization has steadily increased in Europe, but it is worthy of note that the principle of payment of compensation has been for the most part observed at least formally and that the issues which have so far arisen concern the local property of aliens in the countries where nationalization has taken place rather than the foreign property of their nationals. Some examples of nationalization measures[3]

[1] Cmd. 5758 of 1938.

[2] Cmd. 6768 of 1946.

[3] See generally Doman, loc. cit.; De Vries and Hoeniger, 'Postliberation Nationalisation in France', in *Columbia Law Review*, 50 (1950), p. 629; and a very lucid and practical study by Rubin, 'Nationalisation and Compensation, a Comparative Approach', in *University of Chicago Law Review*, 17 (1950), No. 3, p. 458.

and the way in which international claims arising have been settled will now be given.

In Czechoslovakia an Economic Fund for Nationalized Property was established as a separate legal person, and authorized to issue interest-bearing securities by way of compensation to divested owners. These securities are to be redeemed from the profits of nationalized enterprises, redemption and payment of interest being guaranteed by the state; but the Ministry of Industry may at its discretion substitute as compensation the payment of cash or some other valuable consideration. But in this system of expropriation there is a large exception: where nationalized property was formerly owned by Germany or Hungary, or by corporations or individuals of German or Hungarian nationality, or by persons engaged in certain activities against the state, including those convicted of black-market operations, no compensation was payable: the property was simply confiscated.

Poland also combined expropriation, carrying a grant of rather uncertain compensation, and confiscation. The principal Act of Nationalization covered coal and oil production; electric power and gas production; munitions factories; iron foundries; and textile factories. This Act provided for compensation to be paid in the form of securities and assessed by special commissions. But in the task of assessment the commissions were required to take a number of factors into account, all tending to diminish the compensation to be given, namely, the general decrease in the national wealth; the particular decline in value of the nationalized undertaking itself as a result of the war and losses arising from the German occupation; and any investments made since September 1939. Any undertakings owned by German citizens or citizens of the Free City of Danzig were confiscated.

In Yugoslavia the courts were brought into the process of nationalization, which was put into effect over a wide field in December 1946. An inventory and valuation of property and undertakings was to be made and instrument of 'receipt-delivery' executed, on the basis of which the competent District Court made an order transferring title to the state. Compensation took the form of government bearer bonds.

Hungary is credited with the most skilfully designed nationalization statutes of all the Central and East European countries. By Acts extending over the years 1946 to 1948 all electrical works, industrial, transportation, or mining companies, and certain other designated enterprises were nationalized, if employing more than 100 persons on or after 1 August 1946. By a paradoxical but astute provision, aliens and foreign legal persons were permitted to retain their interests in nationalized undertakings, provided that they formally declared their holdings to the Hungarian authorities; similarly, contractual debts of nationalized undertakings to foreign creditors survived the general cancellation of their indebtedness, arising before August 1946, but these foreign claims remained subject to Hungarian foreign exchange control.

In France nationalization was less radical, but after 1944 was carried out intensively and sometimes punitively. Thus S.A. des Usines Renault was dissolved and its assets confiscated on the ground that Louis Renault, who owned 96 per cent. of the stock, had during the occupation collaborated with the Germans. His son, the remaining stockholder, commenced proceedings in the New York courts to secure assets of the dissolved company situated there, but a settlement was reached and the suit withdrawn. Similar steps were taken against the Société des Moteurs Gnome et Rhône, the state acquiring all the shares without payment of compensation except for a very small proportion held by foreign governments. In certain cases, for example the airlines Air France, Air France Transatlantique, and Air Bleu, companies were dissolved and reconstituted as a *société d'économie mixte*, that is, a stock corporation with a small fixed proportion subscribed by private individuals, the remainder being held by the state; while in the case of the coal industry and other major enterprises full state ownership was established.

A number of intergovernmental agreements have been concluded since 1946 in settlement of claims arising from these various programmes of nationalization. France agreed to compensate Swiss and Belgian interests in the French electricity industry on specially favourable terms, both Switzerland and Belgium having insisted that the sums awarded must be protected against devaluation of the franc and adjusted for the fall in stock market values in France when nationalization was imminent; Czechoslovakia also received compensation for its holdings in the French airline companies. Switzerland concluded agreements with Czechoslovakia and Yugoslavia, and reached an understanding with Poland in 1947 on the principle that Swiss claims should be satisfied in Swiss francs.

We shall now consider in more detail the Agreements made by the United Kingdom with Poland on 31 October 1947;[1] with Yugoslavia on 23 December 1948;[2] and with Czechoslovakia on 28 September 1949,[3] in order to bring out some of the salient points.

First, there was no question of confiscation of British property, rights, or interests; in all cases negotiations between the Governments went forward on the footing that compensation was payable and would be paid: thus paragraph 3 of the Polish Agreement provided:

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[1] Poland: Exchange of Notes of 24 January 1948 bringing the Agreement into force (see *International Law Quarterly*, 2 (Autumn, 1948), p. 544.

[2] Yugoslavia: Cmd. 7600, *Treaty Series*, No. 2 (1949); and see Anglo-Yugoslav Money and Property Agreement, Cmd. 7601; Anglo-Yugoslav Trade Agreement, Cmd. 7880, *Treaty Series*, No. 6 (1950).

[3] Czechoslovakia: Cmd. 7797, *Treaty Series*, No. 60 (1949); and see Anglo-Czechoslovak Trade Agreement of the same date, Cmd. 7799.

> 'Compensation to British owners and shareholders under Article 7 of the Polish Law of January 3, 1946, regarding the taking over by the State of the basic branches of the national economy . . . shall be so assessed as to be adequate and so paid as to be effective. Compensation to other British claimants shall be assessed and paid in accordance with the same principle.'

Secondly, as to eligibility for compensation, there were two main questions: whether indirect and beneficial ownership by British nationals was to rank for compensation, and how British interests were to be treated in which there was a German element or which had been affected by German official action during the war. In the Czechoslovak and Yugoslav Agreements the United Kingdom secured the insertion of the following definition:

> 'British property shall mean all property rights and interests affected by the various Czechoslovak/Yugoslav measures which, on the date of the relevant measure, were owned directly or indirectly, in whole or in part, and whether legally or beneficially, by British nationals, to the extent to which they were so owned.'

The United States in Article 2 of its Agreement with Yugoslavia took a stricter view of the extent of its intervention on behalf of United States nationals, it being its traditional practice[1] to protect only substantial American interests, the test being control of the undertaking by United States nationals either by voting power or by participation in management. Where, for example, British and American nationals held minority stock in a Swiss corporation, which owned an undertaking in Yugoslavia, the British stockholder would, it seems, be better placed than the American, though it would be presumably open to the American claimant to benefit from any recovery of compensation by the Swiss corporation under the Swiss–Yugoslav Agreement. But could the British stockholder appear as a claimant under both the United Kingdom–Yugoslav and the Swiss–Yugoslav Agreements? As regards British and American interests in companies having their legal seat in 'the present administrative boundaries of Germany', the exchange of notes between Poland and the United Kingdom and the understanding reached by Poland and the United States in December 1946 (not yet implemented), make limited exceptions to the rule that German-owned undertakings were to be confiscated. In its Agreement with the United Kingdom the Polish Government undertook to pay compensation in respect of these undertakings where 'the combined shareholding of United Kingdom Nationals, whether held directly or indirectly, including holding through the medium of subsidiary companies, amounts to 90% or more of the total shareholding in the company' or, if that condition is unsatisfied, 'substantially the whole assets of the company were on 1 September 1939 located in Poland'. The United States in its Agreement accepted rather less than this, for where the legal seat of the company was in German territory United States nationals owning 51 per cent. or more of the voting stock were to be compensated for their interest in assets of the company situated 'in the present administrative boundaries of Poland', while United States nationals owning less were to receive compensation only if it were found that they had control of the company by participation in the management. In both cases it appears that only those foreign nationals who had controlling interests were to receive compensation; though if the company's assets were situated in Poland, British nationals having a minority interest were also compensated.

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[1] Thus the United States refused in 1927 to intervene on behalf of a British-owned United States corporation having claims against the Mexican Government.

Thirdly, as to the assessment and manner of payment of compensation,[1] there is provision in the Czechoslovak and Yugoslav Agreements for the payment of lump sums, which have been fixed in advance by intergovernmental agreement, while under the Polish Agreement assessment is one of the tasks of a mixed commission. Payment in the former Agreements is to be made in sterling but completed over periods of years. Two points may be noticed: first, the fixed sums of £8,000,000 and £4,500,000 respectively do not nearly represent the value of the British property nationalized, if it were to be given a fair market value; secondly, the settlements were reached as part of wider financial and trade agreements, upon which they are really dependent in that the trade agreements are means by which Czechoslovakia and Yugoslavia might expect to earn the sterling needed to discharge their obligations under the compensation agreements, and in the case of Yugoslavia a substantial sterling credit was advanced by the United Kingdom to enable Yugoslavia to buy goods scheduled in the trade agreement. In rather the same way the United States was able to bargain with the fact that it held $47 million of blocked Yugoslav gold: under the compensation agreement Yugoslavia consented to the release of $17 million for disposal upon the free gold market, the proceeds going to compensation.

What conclusions can be drawn from these recent agreements? It is at any rate clear that the decision of an arbitral tribunal upon the questions of eligibility and quantum of compensation in the Czechoslovak and Yugoslav cases would have been very different in effect from the agreements. But it may be that the United Kingdom, while receiving a smaller amount of compensation than an international tribunal might reasonably be expected to award, was able by agreement to extend the area of eligibility beyond that which such a tribunal would fix;[1] and in any case the tribunal could not have directed the mode of payment, which was only made possible by the auxiliary financial and trade agreements. It may then be fairly asked whether the rules evolved during the period from 1830 to 1920, so eloquently defended by Fachiri in the articles cited, which provided for compensation, by judicial assessment, for the taking of the local property of aliens, can be effectively applied to cases where not a few acres of garden but major national resources are in issue and where the compensation payable may be not a few thousand pounds but a national budgetary problem. In a sense the United Kingdom has had to lend Yugoslavia the money to pay the compensation bill. The answer suggests itself that intergovernmental negotiation and agreement may well be the only effective way of obtaining some compensation for nationalized property and that even so agreement will be reached only if the claimant state is in a strong bargaining position by having assets of the other state within its territory or being able to offer an advantageous financial or trade agreement. Save upon the issue of bare liability to pay compensation, the decision of a judicial body would be a *brutum fulmen*.

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[1] The Foreign Compensation Act, 1950, s. 1, has established a permanent Foreign Compensation Commission, which is to deal in the first place with claims arising upon the Czechoslovak and Yugoslav Agreements (see *S.I.* 1950, Nos. 1191, 1192, and 1193), but may be used to hear claims and determine and distribute compensation received by the United Kingdom under future agreements with foreign governments (s. 3). These future agreements are not limited by the Act to those settling claims arising upon measures of nationalization. The administrative and financial provisions for the Commission and its powers are set out in ss. 1 and 5 of the Act and *S.I.* 1950, No. 1193.

VI

It may be suggested then in conclusion that:

1. A state which, by enactment of law, nationalizes property within its territory commits no breach of international law unless

   (i) it confiscates the property of an alien; or

   (ii) it has by international agreement limited its rights in this field and the nationalization law is contrary to this agreement; or

   (iii) compensation for alien property expropriated under the nationalization law is derisory, or falls below that awarded to nationals, or is indefinitely deferred.

2. The English courts will not recognize or enforce a foreign nationalization law which is both confiscatory and penal.

3. Where property is situated in England, its transfer is governed prima facie by the *lex situs* but may be governed by the *lex actus* of a foreign nationalization decree

   (*a*) where, having regard to all the circumstances, the court considers the foreign law to be the proper law of the transfer; and

   (*b*) provided that there is no penal element in the foreign law which would be contrary to English public policy.

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[1] See Mervyn Jones, 'Claims on Behalf of Nationals who are Shareholders in Foreign Companies', in this *Year Book*, 26 (1949), p. 224.

SOVEREIGNTY OVER SUBMARINE AREAS

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I

SELDOM has an apparent major change in international law been accomplished by peaceful means more rapidly and amidst more general acquiescence and approval than in the case of the claims to submarine areas—the sea-bed and its subsoil—adjacent to the coast of littoral states. These areas have been generally described as the continental shelf. The latter term will be occasionally used in the present article for the sake of both convenience and abbreviation, although the two expressions are by no means identical. The continental shelf is a submarine area adjacent to the coast of the state. But the converse proposition is not necessarily true. In a great number of proclamations and enactments relating to the matter the term 'continental shelf' does not occur at all. In so far as that term has a well-defined geographical connotation—a question which is somewhat controversial[1]—it cannot be regarded as covering all situations arising out of the claim of states to exclusive jurisdiction and control over the sea-bed and its subsoil in the seas adjacent to their territories.

The latter consideration brings into relief the fact, which it is proposed to elaborate here in greater detail, that the problems raised by the proclamations of the continental shelf cannot be resolved by reference to technical notions in the field of geography. Neither, being entirely novel in their nature, can they be satisfactorily explained by exclusive reference to some traditional concepts connected with acquisition of territorial sovereignty. Essentially, the problem which has arisen in connexion with the continental shelf raises not only the question of application of existing international law but also of its adaptation to a situation which at the beginning of the twentieth century was not considered—if it was considered at all—to be within the realm of practical possibility. Accordingly, while account must be taken of such law as there is on the subject, the latter is only one factor in the situation. The other, equally essential, test is that of legitimate interests of states, viewed in the light of reasonableness and fairness, and of the requirements of the international community at large. It will be submitted in this article that the application of these tests leads to the result that there is no existing principle or rule of international law which is opposed to what, for the sake of brevity, may be called here the doctrine and the practice of the continental shelf and that the latter has now, in any case, become part of international law by unequivocal positive acts of some states, including the leading maritime Powers, and general acquiescence on the part of others. The main business of international lawyers is therefore to explain the nature of the rights claimed and acquired under the new practice; to formulate its philosophy, in a manner capable of general application, in terms both of application and of development of the law as distinguished from a mere unilateral assertion of power; to elaborate principles likely to assist in the solution of problems which result from the assertion or assumption of rights over submarine areas, such as the delimitation of the respective spheres of the neighbouring states or the status of installations erected on the high seas superincumbent upon the submarine areas; to examine possible solutions of the difficulties arising out of any conflict between the actual appropriation of the submarine areas and the reasonable emanations of the conception of the freedom of the seas; and to discourage attempts to rely on claims to submarine areas as a screen for exaggerated pretensions alien to the apparent occasion which gave rise to it and inimical to what is the essence of the still beneficent and valid principle of the freedom of the seas.

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[1] See below, p. 383.

For it is possible that what may appear to many the excessive interest of international lawyers in the 'continental shelf' is due not so much to the intrinsic importance of the subject from the economic or political point of view as to its association with the development and the present position of the law relating to the freedom of the seas. In the exhaustive Memorandum on the Régime of the High Seas prepared under the auspices of the Secretariat of the United Nations in connexion with the work of the International Law Commission, the discussion of the continental shelf occupies more than one half of the entire work.[1] In the course of the discussion of the subject in the International Law Commission during its session in 1950 it was freely stated that this was the most important matter that had come before the Commission—possibly second only in importance to the formulation of the principles of the Nuremberg Charter. Several members of the Commission were inclined to share the sanguine estimate of some writers who have compared the assertion of the claims to the continental shelf with the discovery of America.[2] No opinion can be here expressed on the question as to the extent to which such estimates are likely to correspond to economic potentialities of submarine resources, but there is little doubt that the subject has proved to be of considerable attraction for international lawyers. The reason for that, as already submitted, is, in the first instance, that it has become identified—and will continue to be so—with the major problem of the freedom of the seas. It is in this connexion that the view was expressed, in the Memorandum of the Secretary-General of the United Nations, that 'the Grotian idea of the freedom of the high seas is losing the paramountcy[1] which, generally speaking, has survived fairly well down to the present day'.[2]

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[1] Doc. A/CN.4/32, pp. 48–112.

[2] In his Report to the International Law Association, written in 1948, Jonkheer P. R. Feith refers to an article by Professors Clark and Renner in the *Saturday Evening Post*, 14 April 1946, in which the Proclamation of President Truman (see below, p. 380) in the matter of the continental shelf is described 'as one of the decisive acts in history, ranking with the discoveries of Columbus as a turning point in human destiny' (*Report of the 43rd Conference*, Brussels, 1948, p. 195). For the expression of views of some members of the International Law Commission at its Session in 1950 see A/CN.4/S.R. 66, in particular pp. 23, 24, for the statement of Professor Hudson, who voiced the prediction that 'fantastic deposits of oil would certainly be discovered in the subsoil of the Persian Gulf'. Professor Scelle, the Chairman of the Commission, said that Professor Hudson's statement 'reminded him of the discovery of America by Columbus; it had to

In so far as the original conception of the freedom of the seas, as it came to full fruition in the nineteenth century, acquired a rigidity impervious to the needs of the international community and to a régime of an effective order on the high seas, that 'loss of paramountcy' provides no occasion for anxiety. However, it is calculated to constitute a justifiable cause for apprehension in so far as it threatens to affect adversely what is the essence of the notion of the freedom of the seas, namely, the reasonably conceived principle of freedom of navigation and exploitation of their riches not dependent for their protection and preservation upon the exclusive efforts of the coastal state. It is unlikely that any purely doctrinal opposition of lawyers—even if otherwise well founded—would be able to stem the hitherto uniform progress of claims and developments, which are not intrinsically unreasonable, in the matter of the 'continental shelf'. But the attitude of international lawyers may be of assistance not only in containing such developments within the channels of moderation and order, but also in demonstrating that there is little or nothing in the properly conceived notion of the freedom of the seas which stands in the way of such developments. If that is done, then the principle of the freedom of the seas, shown to be able to withstand the impact of contingencies unforeseen at the time of its adoption, will emerge from the trial strengthened and revitalized. If that course is not adopted there may be a danger that the restraints, actual or assumed, of the principle of the freedom of the seas will be disregarded in any case and its general authority impaired by excess and abuse spuriously attaching themselves to the idea of the continental shelf. These considerations explain the importance which the question of the continental shelf has acquired in legal discussion. For it is probable that the issue raised by the proclamations and enactments on the continental shelf is even wider than that of the principle of the freedom of the seas itself. It is the more general issue of the

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be conceived in order to be transformed into reality'. Professor Spiropoulos expressed the view that the continental shelf 'was undoubtedly the most important question with which they had to deal' (at p. 26).

[1] A somewhat free translation of *le caractère primordial* in the original French text.

[2] Op. cit., p. 55.

adaptation of international law, labouring as it does under the absence of effective machinery for creating and changing the law, to fresh needs and conditions of the international community. In comparison with that wider issue the problem of the continental shelf is of limited compass. The work of the two bodies—the International Law Association[1] and the International Law Commission[2]—which have studied the question in its principal aspects justifies the expectation that international lawyers may be fully alive to the implications of that responsibility.

The preceding observations indicate the method which it is proposed to adopt in this article. It will be useful, in the first instance, to survey the various instruments proclaiming rights in the 'continental shelf' in order to ascertain to what extent they are based on the geographical concept of that term and what is the nature—in the alternative terms of sovereignty and exclusive control and jurisdiction—of the authority claimed under them. Secondly, it is necessary to consider the question of the extent to which the doctrine of the 'continental shelf' has become, irrespective of its intrinsic merits, part of the law by virtue of the affirmative conduct of some states and the acquiescence of others. Thirdly, it is intended to inquire, in relation to the fundamental principle of the freedom of the seas, into the legal validity of acquisition of exclusive rights over the sea-bed and its subsoil outside territorial waters. Finally, there will be examined the legal basis of the claims to adjacent submarine areas by reference to the accepted notions of occupation and contiguity in the matter of acquisition of territorial sovereignty.

II. *The proclamations and other instruments relating to submarine areas*

It may be convenient, before drawing attention to the principal types and features of the proclamations and other instruments relating to submarine areas and the continental shelf, to give what is no more than a bare list of these instruments, commencing with the Submarine Areas of the Gulf of Paria (Annexation) Order issued by the United Kingdom on 6 August 1942. While the various instances, prior to that date, of attempts at exploitation of the subsoil of the sea outside territorial waters and of references in official documents to the continental shelf or submarine areas generally are of some historical interest,[1] the Paria Annexation Order may be regarded as the starting-point of the development. Like the Treaty of 26 February 1942[2] between the United Kingdom and Venezuela relating to the Submarine Areas of the Gulf of Paria, in which each of the parties agreed to recognize 'any rights of sovereignty or control which have been or may hereafter be lawfully acquired' by the other party, the Order does not refer *eo nomine* to the continental shelf. Neither does it delimit the frontiers of the annexed area by reference to the conventional depth of the continental shelf (for the reason, apparently, that the Gulf as a whole does not reach that depth). However, like practically all other subsequent instruments appropriating the continental shelf, it expressly discards any claim to territory above the surface of the sea or any part of the high seas and disclaims any intention to prejudice rights of passage or navigation on the surface of the sea. The Order instructed the Governor of the Island of Trinidad, to which the areas in question were annexed, to issue regulations for ensuring that these areas should not be closed to navigation and that any works or installations should be so constructed and lighted as not to constitute an obstruction or danger to shipping.[3]

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[1] See *Report of the 43rd Conference* at Brussels (1948), pp. 168–206 for the Report of Jonkheer P. R. Feith and the discussion thereon. In preparation for the Conference of 1950 the Committee on 'Rights to the Sea-bed and its Subsoil' submitted a statesmanlike Report which, although inconclusive in some of its aspects, constitutes a major contribution to the problem. It was relied upon, to a large extent, by the International Law Commission at its Session in 1950 (see below, pp. 386, 397, 412, n. 1).

[2] The International Law Commission discussed the matter in connexion with the Report prepared by Professor François on the Régime of the High Seas (A/CN.4/17). For the discussion of the Commission see the procès-verbal of its meetings in 1950 (A/CN.4/S.R. 66–69). See also the Report of the Commission to the General Assembly (*Official Records*, Fifth Session, Supplement No. 12 (A/1316)) for some provisional conclusions on the question of the continental shelf (p. 22).

It was not, however, until 1945 that the terminology and the attempt to provide a philosophy of the doctrine of the continental shelf made their appearance in official instruments. Both formed part of the Proclamation of the President of the United States[4] of 28 September 1945. The latter, in turn, was the starting-point for a series of Proclamations by Latin-American and other States. Thus the proclamation of the United States was followed by a Declaration of Mexico of 29 October 1945[5] and the Declaration of Argentina of 9 October 1946 proclaiming sovereignty over 'the epicontinental sea and the continental shelf'.[6] Similar, but more far-reaching, were the Declarations of Chile of June 1947,[7] of Peru of 1 August 1947,[8] and of Costa Rica of 27 July 1948.[9] On 26 November of the same year Great Britain issued the Bahamas (Alteration of Boundaries) Order in Council[1] and the Jamaica (Alteration of Boundaries) Order in Council.[2] In 1949 the Rulers of the territories in the Middle East followed suit with a series of proclamations. These included the proclamation of the King of Saudi Arabia of 28 May 1949[3] and of the following Sheikhdoms, all under British protection, in the Persian Gulf: Bahrein (5 June),[4] Qatar (8 June), Abu Dhabi (10 June), Kuwait (12 June), Dubai (14 June), Shayah (16 June), Umm al Qeiwain (20 June), Ajman (20 June), and Ras el Khaima.[5] On 19 May of the same year a Bill relating to the subsoil resources of the Persian Gulf was approved by the Council of Ministers and laid before the Iranian Parliament.[6] On 2 November 1949 Costa Rica issued a Decree-Law concerning the continental and insular shelf.[7] In 1949 the Senate and Chamber of Deputies of Nicaragua adopted a Declaration laying down that, in conformity with Article 2 of the Constitution adopted in 1948, the continental shelf is that part of the territory which is covered by the sea up to a depth of 200 meters and that in cases in which the continental shelf extends to the coast of another state the line of demarcation shall be established by agreement on the basis of equity. In Article 5 of the Constitution as formally adopted in 1950 the 'continental platform and the submarine shelves' ('zocalas') were enumerated, together with the adjacent islands, the subsoil of the territorial waters, the air space and the stratosphere as forming part of national territory.[8]

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[1] See below, pp. 399–403, 427. See also Mateesco, *Vers un nouveau droit international de la mer* (1950), pp. 99–102. For a reference to the continental shelf see the Report submitted in 1927 by M. Suarez to the League of Nations Committee of Experts on Progressive Codification of International Law in the matter of the Exploitation of the Products of the Sea (C.196.M.70, 1927, V, pp. 63, 122). And see Young in *American Journal of International Law*, 42 (1948), pp. 848–55, and Borchard, ibid. 40 (1946), pp. 53–63.

[2] *Treaty Series*, No. 10 (1942), Cmd. 6400. For an analysis of the Treaty see Vallat in this *Year Book*, 23 (1946), pp. 334–6.

[3] The Submarine Areas of the Gulf of Paria (Annexation) Order, 1942.

[4] For the text of the Proclamation of 28 September 1945 and the Executive Order of the same day see *American Journal of International Law*, 40 (1946), Suppl., pp. 45–48.

[5] See also the Presidential Decree of 25 February 1949 incorporating the property of 'Petroleos Mexicanos', the subsoil of the lands covered by the territorial waters of the Gulf of Mexico, and other lands expressly specified.

[6] For the text see *American Journal of International Law*, 41 (1947), Suppl., p. 11.

[7] *International Law Quarterly*, 2 (1948), p. 135.

[8] Ibid., p. 137.

[9] See below, p. 413.

The following year saw further additions to the instruments asserting rights in submarine areas. Thus on 7 March 1950 the National Congress of Honduras decreed an amendment to Article 4 of the Constitution which laid down that 'the submarine platform or continental and insular shelf, and the waters which cover it, in both the Atlantic and Pacific Oceans, whatever be its depth and however far it extends, form part of the national territory'.[9] On 9 March the Government of Pakistan published a Declaration stating that 'the sea bed along the coasts of Pakistan extending to the one hundred fathom contour into the open sea should, with effect from the date of this declaration, be included in the territories of Pakistan'.[10] On 9 October 1950 the British Honduras (Alteration of Boundaries) Order in

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[1] *Statutory Instruments*, 1948, No. 2514.

[2] *Statutory Instruments*, No. 2574.

[3] See *American Journal of International Law*, 43 (1949), Suppl., p. 156.

[4] See ibid., p. 185.

[5] The text of all these Proclamations is practically identical with that of Bahrein.

[6] For the text see *Revue égyptienne de droit international*, 5 (1949), p. 347.

[7] Decree-Law No. 803.

[8] For the text see Azcáraga in *Revista Española de Derecho Internacional*, 2 (1949), p. 64. See also Mateesco, *Vers un nouveau droit international de la mer* (1950), p. 121.

[9] Honduras Legislative Decree No. 102. The Legislative Decree No. 103 of the same date made consequential amendments in the Agrarian Law.

[10] *Gazette of Pakistan, Extraordinary*, 14 March 1950.

Council was issued.[1] It was followed on 21 December 1950 by the Falkland Islands (Continental Shelf) Order in Council.[2] The two Orders extended the boundaries, respectively, of Honduras and the Falkland Islands to include the area of the continental shelf contiguous to their coasts. On 18 November a Brazilian decree 'expressly recognized that the part of the sea-bed which corresponds to the continental and insular territory of Brazil is incorporated in the said territory, under the exclusive jurisdiction and dominion of the Federal Union'.[3] Finally, Article 7 of the Political Constitution of El Salvador of 1950 declared that the territory of the Republic 'includes the adjacent seas to a distance of two hundred marine miles from low-water mark and comprises the corresponding aerial space, subsoil and continental shelf'—a truly sweeping assertion which was promptly followed by protests on the part of Great Britain and the United States.[4] Reference may also be made in this connexion to the Icelandic Law of 1948 concerning the scientific conservation of the continental shelf fisheries,[5] the Guatemalan Petroleum Law of 1949,[6] and the Philippines Petroleum Act of 1949.[7]

The above bare recital of the various instruments asserting title to submarine areas unavoidably fails to bring into relief significant differences between them. While some of the proclamations and enactments invoke the claim—or the right—to exclusive jurisdiction and control, others speak of sovereignty or of unqualified incorporation into national territory by dint of extension of boundary or otherwise. While some refer to the continental shelf, others speak of the sea-bed and its subsoil (or only of the sea-bed) adjacent to national territory. Some define the area of the continental shelf by reference to the depth of the sea or otherwise; others are silent on the subject or leave the extent of the areas in question to be determined by future agreement. While some purport to extend national sovereignty or jurisdiction by what appears to be a constitutive act of annexation, the majority are couched in language consistent only with a declaration of an already existing title. Some deem it expedient to adduce the reasons of the apparently new departure in the realm of the law of the sea—the philosophy, as it were, of the continental shelf; others confine themselves to a bare announcement of the measures taken or proposed. Above all, while some are limited to a statement of claims and principles in the matter of the continental shelf (or, where there is no continental shelf, of submarine areas generally), others combine such announcement with a claim to jurisdiction or sovereignty over the superincumbent sea and air space.[1]

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[1] *Statutory Instruments*, 1950, No. 1649.

[2] Ibid., No. 2100.

[3] Decree No. 28,840.

[4] See below, p. 413. For a survey of most of these instruments see also the Memorandum of the Secretary-General (referred to above, at p. 377), pp. 58–64, and Azcáraga in *Rivista Española de Derecho Internacional*, 2 (1949), pp. 43–99.

[5] Law No. 44 of 5 April 1948.

[6] Law No. 649 of 30 August 1949.

[7] Act No. 387 of 18 June 1949.

There are only two features—both of them of significance—which these instruments have in common. In the first instance, they all disclaim any intention of interfering with the principle of the freedom of navigation on the high seas as established by the accepted principles of international law.[2] Secondly—though this is extrinsic to the contents of these instruments—none of them has drawn upon itself the protest of any state except in cases in which the proclamation of rights over the submarine areas has been used for asserting exorbitant claims lacking any foundation in law and alien to the apparent occasion which prompted them.[3]

These features of the proclamations and other instruments relating to the continental shelf or submarine areas generally will now be considered in relation to the relevant principles of international law. Before that, however, it is necessary to inquire into the significance of the fact that these instruments do not invariably refer to the continental shelf *eo nomine*; that those which refer to it do not necessarily use it in the same meaning; and that the expression 'continental shelf' has become no more than a convenient formula covering a diversity of titles or claims to the sea-bed and its subsoil adjacent to the territorial waters of the state.

III. *The notion of the continental shelf*

A survey of the various proclamations and instruments announcing the rights in or claims to what passes by the name of the continental shelf shows: (*a*) that in some of them the term 'continental shelf' does not appear at all and (*b*) that in others, apart from the Falkland Islands Order in Council and the Gulf of Paria (Annexation) Order, which define in some detail the boundaries extended by the inclusion of the continental shelf, there is no attempt to delimit the area in question except, in some cases, by reference to the 100-fathom depth.[4] The frequent absence of definition corresponds to the now generally admitted elasticity of the notion of the continental shelf viewed as a geographical concept denoting the platform —the base, the pedestal—on which the continent rests and which gradually slopes towards the sea until, at points where the latter is about 600 feet deep, it descends rapidly towards the depths of the ocean. Geographers now seem to recognize that the contour line of 200 metres is a mere approximation; that there are often a number of successive sharp descents before the ocean depths are reached; and that, as suggested by the author of one of the most authoritative works on the subject, 'the only accurate method of defining the continental shelf is to consider it as lying between the shore and the first substantial fall-off—on the seaward side—whatever its depths'.[1] That 'substantial fall-off' begins in some cases, such as the western coast of North and South America or practically the entire coast of Africa, at a small distance from the coast; in other countries, such as Great Britain, the continental shelf extends in some directions for several hundred miles before the 'substantial fall-off' begins. The continental shelf of the eastern coast of Great Britain extends for nearly 300 miles in the direction of the southern coast of Norway and reaches practically the Norwegian coast before encountering the 'substantial fall-off'. Similarly, there seems to be no continental shelf, in the technical meaning of the term, between Great Britain and Denmark[2] or Great Britain and France. In some important areas there is no 'continental shelf' in the sense indicated. Thus in the Persian Gulf there is nowhere either a rapid drop or a depth of 600 feet. To these areas the geographical concept, even in its general connotation, of the continental shelf does not seem to be applicable at all. That circumstance explains why there is no reference to the continental shelf in the proclamations issued by the Rulers of the Sheikhdoms in the Persian Gulf and why in other proclamations, such as those of Peru and Chile, which refer expressly to the continental shelf, that term is used without even remote reference to its approximate geographical meaning. These and similar proclamations invoke the continental shelf regardless of its depth and extent.[3] It is also clear that for reasons stated the alternative and more general description of the continental shelf as the platform—the base—upon which the continent is supposed to rest is no more than a figure of speech.

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[1] See above, p. 381 and below, p. 413. [2] See below, p. 403. [3] See below, pp. 393, 413–14.

[4] 'One hundred fathoms' and 'six hundred feet' are used interchangeably. They represent the same depth. 200 metres equals 109 fathoms; 100 fathoms equals 180 metres.

It would appear, accordingly, that so far as most of the relevant proclamations and enactments are concerned the expression 'continental shelf' is no more than a general indication of title to areas of indeterminate extent. This is so for the reason that the concept of the continental shelf, viewed as a term of geography, is itself unsatisfactory and somewhat arbitrary inasmuch as it is limited to the depth of 600 feet. Even if this were not so, the usefulness of the concept of the continental shelf, thus limited, would be impaired for the additional reason that its literal application would result in some states having no continental shelf at all, or practically none, while the continental shelf of others might extend for hundreds of miles almost up to the immediate vicinity of the territorial waters of other states. It may be—and has been—suggested that, by international agreement or regulation, states with a very narrow continental shelf should be allotted an extended 'contiguous zone' with regard to their adjacent sea-bed and subsoil and that disproportionately large areas of the continental shelf of other states should be artificially limited. To say that is to admit that the notion of the continental shelf is only of relative usefulness. It is not surprising therefore that in its provisional report on the subject to the General Assembly the International Law Commission found it sufficient to refer to the sea-bed and subsoil of submarine areas.[1] In the course of its deliberations it adopted a formula laying down that 'control and jurisdiction over the sea-bed and subsoil of submarine areas outside the marginal sea may be exercised by a littoral state for the exploration and exploitation of the natural resources therein contained'. It added that 'the area for such control and jurisdiction will need definition, but it need not depend on the existence of a continental shelf'.[2]

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[1] Bourcart, *Géographie du fond des mers. Étude du relief des océans* (1949), p. 130 (as quoted in the Memorandum of the Secretary-General, A/CN. 4/32, p. 50). The French expression for 'substantial fall-off' is 'la première rupture de pente importante'.

[2] In Denmark, where at the time of writing a Commission appointed by the Government is investigating the problem, the position seems to be that while there is a continental shelf proper round Greenland and the Faroe Islands and between Denmark and Norway there is no continental shelf in relation to other countries. See Cohn in *Jus gentium*, 20 (1950), pp. 21–31.

[3] It may be noted in this connexion that the idea, usually associated with the continental shelf, of a flat, gently sloping plateau applies only to some submarine areas such as those adjacent to the arctic Russo-Siberian plateau, while in areas, such as the Apalachian mountain system in the United States, in which chains of mountains run parallel to the shore, the structure of the adjacent submarine area often follows the pattern of broken valleys and ridges. Unless the contrary is expressly stated in the particular proclamation or instrument, i.e. unless there is an explicit reference to a definite depth of sea as limiting the extent of the continental shelf, there is no warrant for the assumption that it has accepted the rough estimate of 600 feet. In the case of the Proclamation of the United States of 28 September 1945 a press release, issued on the same day, referred to the one hundred fathom depth.

The considerations here set forth are not intended to suggest that the notion of the continental shelf was devoid of usefulness from its very inception or that it can no longer fulfil any useful purpose whatever. It served as rallying-point for a new complex of ideas by giving it the authority of a natural geographical phenomenon. This it may continue to do. Moreover, whatever may be the merit of the 600-foot limit, it has the advantage of setting *some* limit. That limit, conceived as a rebuttable presumption of practicability of exploitation, is neither unreasonable nor one arbitrarily arrived at. It signifies an approximation, which probably errs on the side of optimism, to the practical possibilities of the exploitation of the sea-bed and the subsoil. It may thus provide a convenient starting-point for future regulation and agreement. But it must not be more than that. Inasmuch as it makes the law on the subject rigidly dependent upon the hazards of a geographical phenomenon and of natural configuration, it has little likelihood of or claim to acceptance. After all, the attempts at exploitation of the sea-bed and the subsoil are in themselves an assertion of the supremacy of man over a purely natural phenomenon. This approach apparently underlay the provisional report of the International Law Commission to the General Assembly in 1950 when it expressed the view that where the depth of the waters permits exploitation the rights of states to control and jurisdiction shall not be dependent on the existence of a continental shelf; and that any other solution would be unjust to countries having no continental shelf.[1] It is reasonable to assert that if such rights do not depend upon the existence of the continental shelf they cannot also be dependent upon its configuration in any particular case. The coastal state cannot properly be expected to submit to the appropriation or exploitation by a foreign state of relatively shallow areas of the adjacent sea-bed and subsoil for no better reason than that these areas are separated from the continental shelf proper (if there be any) by a drop the depth of which exceeds 600 feet.[2] However, there may be room, in any final solution that may be adopted, for attaching some weight to the view that any absence of equality resulting from hard facts of geography cannot altogether be ignored.

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[1] *Official Record*, Fifth Session, Supplement No. 12 (A/1316), p. 22.

[2] A/CN. 4/SR. 67, pp. 16, 24. The latter part of the formula was adopted on the proposal of Professor Brierly who pointed out that 'legally speaking, the presence or absence of a continental shelf was of no importance'. He instanced Chile as an example of a state which possesses no continental shelf, and added that if a state wished to explore or exploit the subsoil of the sea and was able to do so, 'there was nothing against it from the legal standpoint' (p. 18). For an exhaustive though somewhat inconclusive discussion of the subject see pp. 49–52 and, especially, pp. 102–7 of the Memorandum of the Secretary-General referred to above (at p. 377).

The various proclamations and enactments relating to submarine areas give expression to these difficulties. Their cumulative result is that in relation to the subject-matter of these instruments the expression 'continental shelf', whether it occurs there or not, need not be regarded as necessarily bound up with such ordinary geographical connotation as it otherwise possesses. The same applies probably to any future developments in this field. That expression has served a useful function in the formative period of the adoption of the idea of the exclusive control and jurisdiction of the state over the adjacent sea-bed and subsoil. In so far as it supplies a graphic description of the essential unity of the bed and subsoil of the adjacent sea and of the territory on which it rests, its usefulness is not yet spent. But its continued utility will depend to a large extent on the degree of its emancipation from the technicalities and the designation of its geographical prototype and on its becoming interchangeable with—and, in proper cases, on its being replaced by—some such expressions as 'the adjacent submarine area of the State' or 'the contiguous submarine area of the State'. There may be a disadvantage in referring uniformly to these areas as the 'continental shelf' even when they do not in fact exhibit the characteristics of the continental shelf. On the other hand, there is an advantage in using terms in their accepted meaning in the sphere with which they are normally associated and in assisting in freeing the terminology of international law from the reproach, often justified, of using terms in a peculiar—and therefore artificial—connotation.[1] The expressions 'adjacent submarine areas' or 'contiguous submarine areas' may also tend to emphasize the fact, the implications of which will now be considered, that there is no essential difference between the rights of sovereignty which the state exercises over its territory and its exclusive control and jurisdiction over the submarine areas contiguous to it.

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[1] *General Assembly, Fifth Session*, 1950, Suppl. No. 12 (A/1316), p. 22. This was also the view of the Rapporteur, Professor François (A/CN. 4/17, p. 40). But see the remarks, in a contrary sense, of Professor Hudson (A/CN. 4/SR. 66, p. 28). It appears that in the end the view as formulated by the Commission in its report secured general agreement (A/CN. 4/SR. 67, pp. 6–11).

[2] For this reason in cases in which in states with a narrow continental shelf the substantial fall-off is followed by an elevation which is less than 600 feet deep there would appear to be no cogent or plausible reason for denying to the coastal state the right of appropriation, within a reasonable distance, as in the case of the continental shelf proper.

IV. *The nature of the rights over submarine areas*

The language of the proclamations and other instruments and enactments relating to appropriation of or assertion of claims over submarine areas does not supply a clear answer to the question whether these rights are rights of sovereignty, or merely rights of jurisdiction and control, or—whether it be 'sovereignty' or merely 'jurisdiction and control'—whether they are rights over the submarine areas or over their resources. The purely British proclamations, such as those embodied in the Orders in Council relating to the Gulf of Paria and to the continental shelf of the Bahamas, Jamaica, and Falkland Islands amount, by clear implication, to an assumption of rights of full sovereignty. No other interpretation can be put on the announcement that the 'boundaries' of the territories in question are 'extended' so as to include the continental shelf or that the Gulf of Paria is annexed. This result is not inconsistent with the repeated acknowledgement of the overriding duty and determination to respect the principle of freedom of navigation on the high seas. For the same principle applies to territorial waters; yet the sovereignty of the state over them is now an indisputed part of international law. Full sovereignty over the continental shelf is claimed explicitly in some proclamations such as those of Argentina, Chile, Peru, Costa Rica, Nicaragua, Honduras, and El Salvador. The same applies to the Brazilian decree of 1950 which 'declares the incorporation in the national territory of that part of the sea-bed which corresponds to that territory'. The absence of intention to distinguish between 'exclusive control and jurisdiction' on the one hand and sovereignty on the other is shown in the recitals of the Brazilian decree which speaks of the 'interest in the declaration of sovereignty or of the dominion and jurisdiction of States over the region thus accruing to the national territory'. The same trend of thought is expressed in the operative Article 1 of the Decree in which 'it is expressly recognized that the part of the sea-bed which corresponds to the continental and insular territory of Brazil is incorporated in the said territory, under the exclusive jurisdiction and dominion of the Federal Union'. This is also the effect of the Pakistanian Declaration of 1950 which, in pursuance of Section 5 of the Government of India Act, 1935, relating to accession of new states to the Indian Union declares the sea-bed along the coast of Pakistan 'extending to the one hundred fathom contour into the open sea' to 'be included in the territories of Pakistan'. The Mexican Proclamation of 1945, while declaring that 'it is not reasonable, wise or possible that Mexico should ignore jurisdiction, exploitation and control' over the continental shelf, proceeds to state that 'the Government of Mexico claim the whole of the continental platform or base adjacent to its coast'.

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[1] See below, pp. 415 and 421, as to 'effective occupation' and 'inchoate title'.

With these claims to full sovereignty there may be contrasted the proclamation issued by the United States in 1945. It declared that 'the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control'. It would seem not only that the assumption of 'control and jurisdiction' was preferred to assumption of 'sovereignty', but also that the 'control and jurisdiction' thus claimed had reference not to the sea-bed and subsoil of the continental shelf as such but merely to the resources of the continental shelf. That nuance of language was, it appears, intentional. It may have been due, in the first instance, to the fact that according to the constitution of the United States formal annexation or acquisition of territory requires legislative approval and cannot be accomplished by Presidential proclamation. Secondly, in view of the persistent attitude of the United States in the matter of acquisition of sovereignty over arctic and antarctic regions—an attitude based on a rigid insistence on effective occupation as a condition of acquisition of a valid title—it was deemed preferable to give a somewhat different and less emphatic formulation to a claim based on the fact of contiguity.[1] As pointed out below,[2] such caution was probably unnecessary seeing that the situations are hardly comparable. However that may be, that attachment to consistency may explain not only the reluctance to adopt the terminology of sovereignty but also the decision to assert the claim by means of a Presidential proclamation. Finally, it is possible that some importance was attached to the theory that 'sovereignty and ownership go together' and that in view of domestic controversies in the United States concerning the ownership of the subsoil of the continental shelf[3] the express assumption of sovereignty was deemed to be prejudicial to an as yet unresolved issue.

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[1] See below, pp. 423, 429.

[2] See p. 416.

[3] See below, p. 392, n. 3.

Be that as it may, the cautious formulation by the United States of its title over the continental shelf has not been followed by other states. Thus in the proclamation of 1949 of Saudi Arabia the 'subsoil and the sea bed of those areas of the Persian Gulf seaward from the coastal sea of Saudi Arabia but contiguous to its coasts, are declared to appertain to the Kingdom of Saudi Arabia and to be subject to its jurisdiction and control'. It is no longer the *resources* of the subsoil and the sea-bed, but those areas themselves which are declared to *appertain* and to be subject to the exclusive jurisdiction and control of the state. The proclamations issued by the rulers of the British protected states in the Persian Gulf adopted the same wording.

There remains the question whether there is any difference between declaring that the sea-bed and the subsoil appertain—belong—to the state and declaring that they are under its sovereignty. The difference, it is believed, is merely one of words.[1] An area which is under the state's exclusive control and jurisdiction, not delegated by or accountable to a foreign government or authority,[2] is under the sovereignty of that state. It is part of that state. An area declared to be henceforth within the exclusive jurisdiction and control of a state becomes part of its territory. As such it benefits from rights accruing to the state by virtue of the treaties previously concluded by it; similarly it is subject to obligations arising from such treaties. For exclusive jurisdiction and control is sovereignty. This is so necessarily seeing that state territory 'is the space within which the State exercises its supreme authority'.[3]

It is probable that while for reasons of its constitutional law and of attachment to consistency in its diplomatic practice the United States may have resorted to a terminology intended to dispel the appearance of assumption of sovereignty, it used words and assumed powers which in fact can have no other result. To say that the state has acquired an exclusive right of control and jurisdiction over the resources of the submarine areas but not over the submarine areas themselves may be as artificial as saying that the coastal state has no right to the submarine areas by virtue of a proclamation or otherwise, but that it acquires as the result of such a proclamation an exclusive right of occupation of the sea-bed and subsoil of the submarine areas (or of the resources of the subsoil). In a sense, so far as the actual practice of states is concerned, the question whether the relevant proclamations or enactments amount to assumption of sovereignty is answered by the terms of these instruments. They—in the majority—either refer expressly to the assumption of sovereignty or do so by stating that the adjacent submarine areas 'belong' or 'appertain' to the states. This, it has been suggested, is also in essence the position with regard to the Proclamation of the United States. Accordingly, to the extent to which these proclamations and enactments have not encountered protest and must therefore be regarded as not inconsistent with international law,[1] the question whether the authority of the coastal state over the adjacent submarine areas is one of sovereignty must be regarded as having received a conclusive answer. For these proclamations and enactments have, in law and in fact, assumed sovereignty. In the course of the deliberations of the International Law Commission those members who voiced a reasoned opinion on the subject expressed themselves in favour of the view that the powers of the state in the adjacent submarine areas are those of sovereignty.[2] The provisional report of the Commission to the Fifth Session of the General Assembly of 1950[3] used language of studied restraint which, perhaps, was not fully in keeping with the views expressed in the course of its deliberations. It stated that 'the sea-bed and subsoil were subject to the exercise, by the littoral States, of control and jurisdiction for the purposes of their exploration and exploitation'. In so far as the use of such language can be interpreted as deprecating the idea of the sovereignty of the coastal state over the adjacent submarine area, it is at variance, apart from the single exception of the proclamation of the United States, with the relevant proclamations and enactments of all other states which have claimed sovereignty either expressly or by obvious implication inasmuch as they included these areas within their boundaries or declared them to belong—to appertain—to their states.

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[1] See to the same effect Sir Cecil Hurst in *Transactions of the Grotius Society*, 34 (1948), p. 161, and Vallat in this *Year Book*, 23 (1946), p. 337.

[2] Undoubtedly, on occasions, states exercise jurisdictional rights over territory—rights of 'jurisdiction or control' or 'exclusive jurisdiction and control'—although they do not possess or claim sovereignty. This is so in all cases in which the exercise of sovereignty is divorced from residuary sovereignty vested with and delegated by a higher authority (as in the case of the mandates of the League of Nation or trust territories under the Charter of the United Nations) or by another state (as in the case of leases, grants in perpetuity, and the like). None of these broad contingencies occurs in relation to submarine areas. There is no authority or state which is entitled to or claims residuary sovereignty over them.

[3] Oppenheim, *International Law*, vol. i (7th ed., 1948), p. 408.

It is not believed that such a claim to sovereignty, pure and simple, over submarine areas is improper or—assuming that it is not otherwise contrary to international law in general or to the principle of the freedom of the sea in particular[1]—that it does not provide the best solution. Sovereignty over the adjacent submarine areas—like sovereignty over territory in general—is not incompatible with restrictions imposed by customary international law or undertaken by treaty. Thus although the rights acquired, or claimed, by states over submarine areas are rights of sovereignty, this does not mean that they are not subject to such limitations as follow from international law and, in especial, from any reasonable requirements of the principle of the freedom of the sea. In particular, the normal extent of territorial sovereignty as expressed in the principle *usque ad coelum* does not apply in this case either in relation to the superincumbent sea or to the air above it. Similarly, the general rule of freedom of navigation in so far as it has a practical meaning in relation to the bed of the sea may be fully applicable as in the case of the right to lay cables and, probably, pipe-lines.[2] There is therefore little point in limiting the right of states over the submarine areas to control and jurisdiction and confining the latter, in turn, to control and jurisdiction for the purpose of exploration and exploitation only. There is no other use to which such control and jurisdiction could be put. Such exceptions as those relating to the superincumbent sea and air and to freedom to lay cables and pipe-lines on the sea-bed can, without difficulty, be accommodated within the orbit of the traditional conception of territorial sovereignty. Thus the sovereignty of the state over its territorial waters is not inconsistent with the generally accepted principle of innocent passage.

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[1] See below, pp. 393–8.

[2] This, in particular, was the view of Professor Brierly and the Rapporteur (Professor François) who described the view formally expressed by the Commission as amounting to admitting sovereignty (*Minutes*, A/CN. 4/SR. 68, pp. 6–8).

[3] *Special Supplement* No. 12 (A/1316), p. 22. The proposals submitted in 1950 to the Conference of the International Law Association by its Committee on 'Rights to the Sea-bed and its Subsoil' referred throughout to the *control and jurisdiction*, by the coastal state, over the sea-bed and the subsoil of the continental shelf. In the course of the deliberations of the International Law Commission in 1950 Professor François made the interesting suggestion that there existed a substantial distinction between sovereignty on the one hand and jurisdiction and control on the other. He submitted that while in regard to the first the powers of the state were limited only to the extent of obligations specifically undertaken, with regard to the second its powers extended only to the extent to which they have been expressly conceded (A/CN. 4/SR. 68, p. 7). There seems to be no warrant for that distinction in accepted terminology.

In fact, through the entire branch of international law relating to state territory and territorial sovereignty there runs as a constant theme the phenomenon of limitation of sovereignty in various spheres and directions. This is not confined to so-called state servitudes or to those instances in which the exercise of sovereignty—actual control and jurisdiction—is divorced from residuary sovereignty as in the case of so-called political leases or grants in perpetuity. It is sufficient to mention the less sweeping limitations resulting from express treaty stipulations, such as the air bases granted in 1941 by Great Britain to the United States, or from rules of general international law such as the prohibition of nuisance or the limitations upon the state's freedom of action in respect of the use of non-national rivers. It follows from this capacity of territorial sovereignty to adaptation and modification that the sovereignty of the coastal state over the adjacent submarine areas is fully compatible with its obligations in respect of freedom of navigation on the high seas and of passage, on and through the bed of the sea, of cables and pipe-lines.[1] 'Sovereignty' has adverse and, for some, justifiably, sinister connotations. But it is an established term of a clarity transcending that of 'control and jurisdiction'. In particular it implies not only rights but also international responsibility—an aspect of the situation which is of particular importance in relation to a problem of conspicuous novelty within Federal states and which in the United States has led the Supreme Court, in face of considerable authority to the contrary and weighty dissents, to affirm the ownership of the United States over the subsoil of the sea-bed both under the territorial waters[2] and outside them.[3] In this matter—as in many others—the proper method is not to attempt to solve the difficulties inherent in a novel situation by choosing terms of studied vagueness and elasticity but by using language which, for the very reason that it has an accepted connotation, lends itself to qualification and modification with the view to meeting the exigencies of new problems.

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[1] See below, pp. 398, 401–3.

[2] See below, pp. 402, 414. International practice shows the feasibility of a combination of rights of passage more complicated than that resulting from an accumulation of pipe-lines. See, for instance, the arrangement of 1936 between the United States and Panama providing for a corridor in favour of Panama across the United States zone and for a right of transit for the United States across the corridor created for Panama (*American Journal of International Law*, 34 (1940), Suppl., p. 144).

As already suggested, the question of the nature of the right over the adjacent submarine areas is to a large extent an academic question inasmuch as it has been resolved by the practically unanimous practice of the coastal

[1] See below, pp. 402, 414.

[2] *United States* v. *California* (1947), 332 U.S. 19.

[3] *United States* v. *Texas* (1950), 339 U.S. 707. See also, to the same effect, *United States* v. *Louisiana* (1950), 339 U.S. 699. The main reason, in *United States* v. *California*, for distinguishing the principle established in *Pollard's Lessees* v. *Hagan*, 3 How. 212, that a state title prevailed over federal ownership with respect to 'internal waters' (i.e. land between low-water and high-water mark) was the paramount factor of the fulfilment of the international responsibilities of the United States. The Court said: 'The ocean, even its three-mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. . . . The state is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks. . . . Consequently, we are not persuaded to transplant the *Pollard* rule of ownership as an incident of state sovereignty in relation to internal waters out into the soil beneath the ocean, so much more a matter of national concern.' The Opinion of the majority of the Court was in keeping with a series of its pronouncements since the First World War in which in deference to the international responsibilities of the Union the Supreme Court affirmed in various ways the paramountcy of Federal action over the constitution of states and their rights and even over certain constitutional conventions of the United States itself. See, e.g., *Missouri* v. *Holland* (1920), 252 U.S. 416; *United States* v. *Curtiss-Wright Export Corporation* (1936), 299 U.S. 304; *United States* v. *Belmont* (1937), 301 U.S. 324; *Hines* v. *Davidovitz* (1941), 312 U.S. 52; *United States* v. *Pink* (1942), 315 U.S. 203. No opinion is here expressed as to the cogency, in relation to submarine areas, of the argument based on the international responsibilities of the Union. The case of *United States* v. *Texas*, based to a large extent on the decision of *United States* v. *California*, was decided by reference to the terms of the admission of Texas into the Union 'on an equal footing with the existing States'. It must remain a matter of speculation whether a less literal interpretation of the equality clause, for which impressive precedents can be found in international practice and—it is submitted with some diffidence—in the constitutional practice of the United States, would have led to a different conclusion. See also Illig, 'Tidelands—an Unsolved Problem', in *Tulane Law Review*, 24 (1950), pp. 51 ff.

states concerned—a practice which has not been followed by protests by other interested states or by states in general. It is now necessary to consider the question of the relevance of the absence of protest with regard to both the claim to the adjacent submarine areas and to the nature of the right, conceived as a right of territorial sovereignty, as generally advanced.

V. *Sovereignty over submarine areas as part of customary international law. The relevance of absence of protest*

A conspicuous and significant feature of the various proclamations and other formal assertions of the right to adjacent submarine areas has been the degree of general acquiescence in what at first sight appeared to be a startling innovation. That acquiescence has expressed itself in an entire absence of protest except in isolated cases in which the proclamation of rights over the adjacent submarine areas has been combined with or has served as a cloak for the assertion of claims to sovereignty over the high seas.[1] When in 1949 the Rulers of some territories in the Persian Gulf, acting under what is in law and in fact the international responsibility of Great Britain, issued proclamations declaring the adjacent submarine areas to be subject to their 'exclusive jurisdictional control', they asserted—apparently having regard to similar proclamations issued in the four preceding years—that a right of that nature 'has been established in international practice by the action of other States'.[2] Four years in international relations is on the face of it too brief a period to make possible the creation of a new rule of customary law. However, assuming—an assumption which, it will be submitted, is unnecessary—that the emergence of the doctrine of sovereignty over the adjacent areas constituted a radical change in pre-existing international law, the length of time within which the customary rule of international law comes to fruition is irrelevant. For customary international law is not yet another expression for prescription. A 'consistent and uniform usage practiced by the States in question'—to use the language of the International Court of Justice in the *Asylum* case[3] —can be packed within a short space of years. The 'evidence of a general practice as law'—in the words of Article 38 of the Statute—need not be spread over decades. Any tendency to exact a prolonged period for the crystallization of custom must be proportionate to the degree and the intensity of the change that it purports, or is asserted, to effect. With regard to the submarine areas adjacent to the coast the assertion of sovereignty over them would constitute a drastic change in the law only if it could be shown that the international law of the sea—as distinguished from the deductions made by writers on the consequences of the principles of the freedom of the sea—actually prohibited, instead of being merely silent on the matter, the appropriation of the sea-bed and the subsoil outside the territorial waters. This, as will be submitted, is not the case. There is no significance in the circumstance that rights in submarine areas have been expressly asserted by some states only—by a minority of states. For it is apparent that most of the other states may have felt no need to put forward what, in the circumstances of the case, would be no more than a gesture. They can do it at any time. The issue of a proclamation is an act wholly dependent upon the will of the state in question. This is so whether we do or do not accept the view that rights in submarine areas which are a contiguous part of the territory of the State belong to it *ipso jure* without the necessity of issuing a proclamation declaratory of its rights.

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[1] See below, p. 413.

[2] Already in 1947 Peru, in the recitals of her Decree regarding national sovereignty and jurisdiction over the continental and insular shelf, asserted that such right 'has been claimed by other countries and practically admitted in international law' (see below, p. 424).

[3] *Reports*, 1950, p. 276.

Moreover, assuming that we are confronted here with the creation of new international law by custom, what matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere, of states inaugurating the change. In a matter closely related to the principle of the freedom of the seas the conduct of the two principal maritime Powers—such as Great Britain and the United States—is of special importance. With regard to the continental shelf and submarine areas generally these two states inaugurated the development and their initiative was treated as authoritative almost as a matter of course from the outset. This was so in particular having regard to the traditional attachment of these states to the principle of the freedom of the seas and the customary limit of the territorial waters.[1]

At the same time, the very fact that the apparent change was introduced by the two leading maritime Powers firmly—and, on occasions, rigidly[2]—wedded to the principle of the freedom of the seas raises the question whether the change thus effected was not more apparent than real. As will be submitted in the next section it is doubtful whether the practice of these—and other—states in the matter of the continental shelf, and submarine areas generally, amounts to a drastic change in the law. Its initiation did no violence to any established prohibition—or proposition—of international law. In that sense the various proclamations and enactments relating to the continental shelf constitute, in the language of Article 38 of the Statute of the International Court of Justice, 'international custom, as evidence of a general practice accepted as law'. In that sense the inauguration and the reception of the 'new' law relating to the continental shelf and other submarine areas throw instructive light on the mysterious phenomenon of customary law which is deemed to be a source of law only on condition that it is in accordance with law. To that extent custom is both a source of law and evidence of it—a suggestive reminder that the difference between a source of law and its evidence is only a matter of degree. Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constituting evidence of it.[1]

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[1] See, e.g., the judgment of the Mixed Tribunal of Port Said, reported in *Annual Digest*, 1925–6, Case No. 1, in which it was held that although Egypt was not among the Powers which signed the Brussels Convention of 1910 on Salvage, the Convention, which was signed by nearly all maritime Powers, was applicable by the Mixed Courts of Egypt (*Crichton* v. *Samos Navigation Company*).

[2] See below, pp. 404–5.

Similar considerations are relevant to the fact that the proclamations and declarations of rights in the adjacent submarine areas have not been followed by protests. The significance of that fact—as of protest in the international sphere generally—shows itself in various directions. In the first instance, the absence of protest on the part of other states may be fairly interpreted as meaning that *they* 'accepted as law'—i.e. as being in conformity with the existing law—the practice of other states relating to submarine areas. While that practice may have justly created the appearance of novelty, it does not follow that the law on which it is based is new. To that extent the absence of protest, in face of an apparently new departure publicly proclaimed, provides evidence of the essential conformity of the new practice with the principles of international law.

However, in addition to providing evidence as to the views of governments on the existing legal position, the absence of protest on the part of interested states—for in the case of most proclamations and other instruments in the matter of submarine areas there must have been states actually or potentially directly affected—may in itself bring about legal effects. For the absence of protest in the past can be adduced not only as showing that in the view of the complaining state itself the act which is now being made the subject of challenge was not inconsistent with international law. The absence of protest may, in addition, in itself become a source of legal right inasmuch as it is related to—or forms a constituent element of—estoppel or prescription. Like these two generally recognized legal principles, the far-reaching effect of the failure to protest is not a mere artificiality of the law. It is an essential requirement of stability—a requirement even more important in the international than in other spheres; it is a precept of fair dealing inasmuch as it prevents states from playing fast and loose with situations affecting others; and it is in accordance with equity inasmuch as it protects a state from the contingency of incurring responsibilities and expense, in reliance on the apparent acquiescence of others, and being subsequently confronted with a challenge on the part of those very states.

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[1] For some indirect discussion of the authority of unilateral declarations as a source of international law see Pflüger, *Die einseitigen Rechtsgeschäfte im Völkerrecht* (1936). The Memorandum of the Secretary General (see above, p. 377) draws attention to the following passage in *The Scotia* (1871), 14 Wall. 170; Hudson's *Cases* (2nd ed., 1936), p. 672: 'Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single State, which were at first of limited effect, but which when generally accepted became of universal obligation.'

The juxtaposition of these elements reveals the close connexion between prescription, protest, and estoppel in the international sphere. The duty to protest, and the relevance of the failure to protest, are especially conspicuous in the international sphere where the normal avenues for ascertaining disputed rights through the compulsory jurisdiction of tribunals are not always available. Thus there may exist a clear cause of action on account of an international wrong and yet a protest may be for the time being the only appropriate course for the reason that the offending state is not bound by any commitment of obligatory judicial or arbitral settlement and refuses voluntarily to submit to international adjudication. Or there may have taken place a legislative or administrative act in the nature of a proclamation of intention and assertion of a right, and yet, unless an actual attempt has been made to apply the law or decree in question and until an injury has actually occurred, it is probable that no judicial remedy will lie.[1] In that instance, too, a protest may be both proper and necessary for the reservation of a right. The same applies to cases in which the remedy of appeal to a political agency such as the United Nations is not available for the reason that, according to its constitution, the controversy is of not sufficient importance in terms of preservation of international peace to warrant action, even of a conciliatory nature, in relation to the subject-matter of the dispute. Thus, as the case of the Finnish shipowners showed, the Council of the League of Nations interpreted rigidly the provision of Article 11 of the Covenant which, apparently, did not confer upon it jurisdiction to entertain complaints in matters other than those relating to 'any war or threat of war'. The same applies to the provisions of Chapter VI of the Charter of the United Nations which is confined to disputes 'the continuance of which is likely to endanger international peace and security'. These circumstances enhance the importance, in the international sphere, both of protest and of the failure to protest. That factor figured conspicuously among the reasons underlying the judgment of the Permanent Court of International Justice in the case of *The Lotus*. The Court referred to the several instances, quoted in argument, of criminal proceedings in respect of collisions before the courts of a country other than that of the flag of the vessel concerned, and stressed the fact that in these cases the states affected did not object and refrained from protesting. The Court said:

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[1] This principle was expressed with clarity by Mr. Beckett (as he then was) in the Third Committee of the Hague Conference of 1930 for the Codification of International Law. He said: 'It is not the enactment of the law which produces the breach of an international obligation, but its application, and, until the court has applied the law, it cannot definitely be said if there has been a breach of international law' (*Minutes*, p. 71). The British Reply to the Questionnaire of the Committee of Jurists on the subject was in practically identical terms (*Bases of Discussion, Responsibility of States*, p. 27). See also ibid., p. 29, for the Swiss reply. See also Anzilotti, *Cours de Droit International* (French translation, 1929), pp. 474, 475. The matter is of some difficulty. Although prior to the application of the law no actual injury can, as a rule, be deemed to have occurred, the legislation can at least be regarded as a manifestation of intention to commit an international wrong and as such calling for protest. Moreover, it is possible that legislation as such may, because of resulting uncertainty, have injurious effects. In connexion with the Panama Canal controversy arising out of Canal Tolls Act of 1912 it was maintained by the United States that the British protest against the Act was inadmissible as no action had yet been taken on the Act (see Wright in *American Journal of International Law*, 32 (1938), p. 530). See p. 23 of the Judgment of the Permanent Court of International Justice in the *Lotus* case where the Court seems to have attached importance to the fact that states had omitted to protest against the criminal law of other states which contained provisions asserting jurisdiction over foreigners for acts committed abroad (Series A, No. 10).

> 'This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown. . . . It seems hardly probable, and it would not have been in accordance with international practice, that the French Government in the *Ortigia-Oncle Joseph* case and the same Government in the *Ekbatana-West-Hinder* case would have omitted to protest against the exercise of criminal jurisdiction by the Italian and Belgian Courts, if they had really thought that this was a violation of international law.'[1]

It follows from what has been said above that any such duty to protest is especially incumbent upon states directly interested—in the case of the proclamations relating to submarine areas in particular upon neighbouring states—though there would be nothing improper, and might be prudent, for other states to assert their legitimate interest in upholding, through protest, a legal principle of general application. The international law of both peace and war provides numerous examples of such protests.[2]

On the other hand, it is probably true to say that the absence of protest is irrelevant if the action of the state claiming to acquire title is so wrongful in relation to any particular state or so patently at variance with general international law as to render it wholly incapable of becoming the source of a legal right. This would be so even if the illegal action in question were formally announced to the world and even if it directly affected the interests of a particular state. In such cases a protest may be advisable; it is not essential. Thus, for instance, if a state were to proclaim an exclusive right of navigation, jurisdiction or exploitation on what is regarded by the generality of states as part of the high seas, the absence of protest would hardly make any difference to the legal position—in the same way as the manifest illegality of any other action would preclude it from becoming a valid basis for precedent. *Ab injuria jus non oritur*. There are acts which are so tainted with nullity *ab initio* that no mere negligence of the interested state will cure it.[1] For reasons which have been given and which will be developed presently, this is not the situation with regard to the proclamation—or assumption—of sovereignty over submarine areas. In these cases the absence of protest was expressive of the fact that in the view both of the states declaring the title and of the states which have acquiesced in it that action was not inconsistent with existing law and that although it may have inaugurated a new practice it did not inaugurate new law. However, the conformity of that action with the pre-existing principles of international law in the matter of the freedom of the sea is controversial and that aspect of the question must now be considered in some detail.

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[1] *Series A*, No. 10, p. 29. See also, on the relevance of absence of protest in the case of declarations of sovereignty by other states, the award, given in 1933, in the *Guatemala-Honduras Boundary Arbitration, Annual Digest*, 1933–4, Case No. 46 (IV); *Reports of International Arbitral Awards*, vol. ii (1949), p. 1327. And see, to the same effect, op. cit., vol. i, pp. 250, 262, 280, the award of 1922 in the arbitration between Colombia and Venezuela. See also for an affirmation of the relevance of absence of protest as barring prescription the award, in 1911, in the Chamizal arbitration between the United States and Mexico (*American Journal of International Law*, 5 (1911), pp. 785–812, at p. 807); and the *Walfisch Bay* arbitration in 1911 between Great Britain and Germany (Hertslet's *Treaties*, vol. 26, pp. 187–250, at p. 249). And see Johnson in this *Year Book*, pp. 332–54 above.

[2] See Oppenheim, vol. i (7th ed. by Lauterpacht, 1948), § 135 (4); vol. ii (6th ed., revised, 1944), § 246. See also Bernard, *Neutrality of Great Britain during the American Civil War* (1870), pp. 199 ff., for the protests of Germany, Austria, and France against the seizure of Messrs. Mason and Slidell from the *Trent*.

VI. *The freedom of the seas and sovereignty over submarine areas*

In answering the question of the compatibility of the assumption of sovereignty over adjacent coastal areas with the principle of the freedom of the seas, it must be borne in mind that the problem involved is novel in character and that in examining it we can derive no substantial assistance from any previous articulate practice of states in relation to the bed of the sea and its subsoil. Apart from the isolated and somewhat exotic instances of pearl and oyster fisheries and the like there is, as will be seen,[2] no such practice. There exists a voluminous body of opinions of writers applying to these questions their interpretation of and deductions from the conception of the freedom of the sea. Although such opinion is not altogether unanimous, it merits, in so far as it proceeds from the principle of the freedom of the sea, careful consideration. On the other hand, while the conception of the freedom of the sea represents a venerable and almost universally accepted part of international law and although its force is far from spent, there is no such immutability about it as to preclude investigation into the possibilities of its adaptation to new circumstances and problems. Clearly, a great deal of the historic argument on which it was founded is no longer applicable. Grotius's explanation that what cannot be effectively occupied cannot become subject to the sovereignty of a single state no longer carries conviction. If effective occupation means the physical power of excluding and eventually controlling the conduct of any person whatsoever within the area in question, then large portions of the high seas lend themselves to effective occupation not only by means of guns, with their present range, along the coast of the state but also by other means. We recall the —not irrelevant—British argument, in the course of the prolonged correspondence with the United States during the First World War, on the undoubted effectiveness of the so-called long-distance blockade. The second explanation given by Grotius, namely, that that which by nature can be used by all without its substance being exhausted ought not to be subject to the exclusive dominion of a single state, hardly applies in modern conditions without far-reaching modifications. For experience has shown that some of the resources of the high seas may not be inexhaustible unless wisely husbanded by international agreement and co-operation. However, the principle of the freedom of the seas has now become part of international law irrespective of the legal arguments which assisted at its birth. It still provides the proper and convenient starting-point in any consideration of problems arising out of its application.

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[1] See on the whole subject Guggenheim in *Hague Recueil*, 74 (1949) (1), pp. 195–263.

[2] See below, p. 402.

At the same time the principle of the freedom of the seas cannot be treated as a rigid dogma incapable of adaptation to situations which were outside the realm of practical possibilities in the period when that principle first became part of international law. In that period the notion of the exploitation of the resources of the subsoil of the sea was too remote from reality to call for or to admit of serious consideration. At the end of the nineteenth century the subject acquired a certain—essentially still theoretical—importance in connexion with some English enactments such as the Cornwall Submarine Act, 1858,[1] and the plans to construct a tunnel under the Channel between Great Britain and France. On the part of the great majority of writers there was no disposition to deny the lawfulness of such appropriation of the subsoil of the sea, especially if the operations for that purpose started from the territorial waters of the coastal state. Writers did not as a rule expressly exclude the possibility of acquisition or assumption of title over the subsoil of the sea as the result or for the purpose of operations commencing from the surface of the high seas. With isolated—though not unimportant[1]—exceptions they were not prepared to permit any abstract deductions from the principle of the freedom of the sea to stand in the way of any future developments.[2] Professor Hyde, writing in 1945 without any apparent hesitation, said: 'The subsoil appurtenant to the coast of a State and *extending therefrom* into an area beneath the high sea is doubtless susceptible to acquisition by that State. Accordingly, by appropriate processes indicative of the assertion of control, a right of sovereignty therein may be brought into being.'[3] He added: 'It is not understood, however, that the United States has found occasion to endeavour to exercise such a privilege.' The italicized words in the passage quoted above were not probably intended to indicate that the right of acquisition is dependent upon whether it starts from the territorial waters. But the clarity of the statement is expressive of the change which had taken place since 1918 when the Department of State of the United States gave a somewhat hesitating—though, in fact, not negative—reply to a question put to it by some citizens of the United States who purported to have discovered a large oil pool in the Gulf of Mexico about forty miles from land on a reef where the water was less than a hundred feet deep. The State Department was asked whether it would be possible to acquire property or leaseholds, and consequent protection, over that part of the bottom of the ocean. It was also suggested that an artificial island might be erected and the question was put whether such island could be brought under the jurisdiction of the United States. The answer given was that the United States has no jurisdiction over the ocean bottom of the Gulf of Mexico beyond the territorial waters and has therefore no right to grant leaseholds or other property rights in respect of the areas in question. At the same time the petitioners were informed that: '(*a*) unless the creation of an artificial island interfered with the rights of the United States or of its citizens, or formed the subject matter of a complaint made upon apparently good grounds by a foreign Government' it was not likely that the Government of the United States would object to the creation of the proposed island; (*b*) it was not likely that any foreign government would interfere with the plan unless its rights or those of its citizens were injuriously affected; and (*c*) if the island were created it was possible that the United States would exercise 'some sort of control over it'.[1] Though the direct relevance of this incident to the question of the subsoil of the sea may be uncertain, it is indicative of the attitude—already at that time not wholly negative—of the United States.

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[1] The Act provided that 'all mines and minerals lying below low watermark under the open sea adjacent to, but not being part of the County of Cornwall, are vested in Her Majesty the Queen in right of her Crown as part of the soil and territorial possessions of the Crown'. See also Norfolk Estuary Act, 1846, and the Lincoln Estuary Act, 1851. Professor François, the Rapporteur of the International Law Commission in 1950, had no hesitation in admitting that occupation of the subsoil of the high sea was permissible at least so long as its exploitation was possible without touching the surface of the sea-bed (A/CN. 4/17, p. 33). See also to the same effect his observations and those of Professor Brierly at the Session of the Commission in 1950 (A/CN. 4/SR. 66, pp. 20–22).

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[1] See, in particular, Gidel, *Le Droit international public de la mer* (1932–4), vol. i, pp. 502, 508. Nevertheless, Professor Gidel did not altogether deny the right to erect installations on the surface of the sea for that purpose: 'Leur création', he said, 'doit être subordonné à l'agrément, exprès ou tacite, des autres États.' However, see below, p. 408, for a substantial modification of Professor Gidel's views.

[2] This was, very emphatically, the view of Fauchille, *Traité de droit international public*, vol. i, Part II (1925), pp. 18, 19, 61. The literature on the subject is surveyed in some detail in the illuminating Report of Jonkheer P. R. Feith, presented in 1948 to the 43rd Conference of the International Law Association (*Report*, pp. 184–92).

[3] *International Law, Chiefly as Applied and Interpreted by the United States*, vol. i, § 145A.

While with regard to the subsoil of the sea-bed the possibility of interference with the freedom of the sea appeared remote at the time when underwater drilling starting from the surface of the sea (as distinguished from exploitation through activities proceeding from territorial waters) was hardly contemplated, this was not altogether so with regard to the bed of the sea. As to the latter, historic examples of pearl, oyster, and other sedentary fisheries, with occasional accompanying attempts at the exclusion of aliens or at least controlling their activities, made writers more inclined to question the possibility of its future occupation and appropriation—although they were prepared in any case to recognize title acquired in this sphere by prescription. This was the opinion of Professor Gidel,[2] but not, perhaps, of Sir Cecil Hurst who does not seem to have denied the possibility of future occupations.[3] A similar view was expressed in Oppenheim's *International Law*, where, however, the import of the new developments has caused a somewhat perplexing cumulation of apparently contradictory views on the subject.[4]

It is apparent that the views of writers on the question of the occupation and appropriation of the bed of the sea and its subsoil, in so far as they were voiced prior to the proclamations and declarations in the matter of submarine areas, must be regarded as being of distinctly limited importance for the reason that in the nature of things they are not evidence, on this subject, of the practice of states. There was no such practice save for the odd cases of the sedentary fisheries of Ceylon, Madras, Tunis, Bahrein, and, probably, in some parts of Western Australia.[1] The opinions of writers were based on their deductions from and their interpretation of the principle of the freedom of the seas at a time when problems such as those which prompted the appropriation of submarine areas in the middle of the twentieth century had not yet arisen. With few exceptions, they agreed that submarine areas—the sea-bed and the subsoil—were a legitimate object of appropriation and that they did not partake of the nature and of the legal régime of the high seas. But they were thinking in terms of appropriation, through actual use and occupation, of limited portions of the submarine areas—in the case of the subsoil by operations emanating from national territory and territorial waters. They did not discuss—and the necessity for such discussion did not occur to them—the question of appropriation of submarine areas by virtue of some other title and other considerations, determined by economic necessities and scientific progress, which were beyond the reach of their vision or interest. That question, it will be shown, can be answered—and in fact it has been answered—in the affirmative.

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[1] Hackworth, *Digest of International Law*, vol. ii (1941), p. 680.

[2] Op. cit., vol. i, pp. 498–500, 507 ff. See also Higgins and Colombus, *The International Law of the Sea* (1943), p. 541.

[3] In his article in this *Year Book*, 4 (1923–4), pp. 34 ff., Sir Cecil Hurst, after surveying in some detail the practice of states, arrived at the conclusion that, so far as Great Britain was concerned, her claims to sedentary fisheries were a survival of more extensive claims, since abandoned, to sovereignty over the bed of the sea and that in so far as they were based on effective occupation of the bed of the sea they were valid and entitled to recognition. There is nothing to indicate that in Sir Cecil's view such occupation is inadmissible in the future. The concluding passage of his article is as follows: 'The claim to the exclusive ownership of a portion of the bed of the sea and the wealth which it produces in the form of pearl oysters, chanks, corals, sponges or other fructus of the soil is not inconsistent with the universal right of navigation in the open sea or with the common right of the public to fish in the high seas.' See also to the same effect his report to the Institute of International Law, *Annuaire*, 32 (1935), p. 160.

[4] Thus on p. 508 (§ 221) of the 7th ed. of 1948 it is stated that 'the bed of the sea cannot be an object of occupation'; on pp. 575 and 576 (§ 287*bb*) a substantially different view is expressed. It is stated there that 'when regard is had to the arguments which brought about the abandonment of the former claims to occupy the waters of the open sea . . . it must surely be conceded that these reasons do not apply to the surface of the sea-bed or to its subsoil. . . . Although it is traditional to base these cases on the ground of prescription, it is submitted that it would not be inconsistent with principle, and would be more in accord with practice, to recognize frankly that, as a matter of law, a State may by strictly local occupation acquire, for sedentary fisheries and other purposes, sovereignty and property in the surface of the sea-bed provided that in so doing it in no way interferes with freedom of navigation and, perhaps we should add, with the breeding of free-swimming fish.' With regard to the subsoil, the statement of the law is emphatic: 'There is no reason whatever for extending this freedom of the open sea to the subsoil beneath its bed. On the contrary, there are practical reasons—taking into consideration the building of mines, tunnels, and the like—which compel recognition of the fact that this subsoil can be acquired through occupation' (at p. 577).

However, even if submarine areas can, *per se*, be subject to appropriation—by virtue of occupation or otherwise—for the reason that, unlike the high seas, they are not *res omnium communis*, the question still remains whether they can be so appropriated consistently with the fundamental rule of international law embodied in the principle of the freedom of the seas. If their being part of the territorial domain of states is not in itself contrary to international law, the question remains—and to that major question we must now address ourselves—whether the concomitant of their exploitation and utilization is not such as to conflict with the freedom of the seas.

If the activities and control connected with the subsoil of the sea and the sea-bed could be confined to those areas and spaces, any objections, by reference to an abstract principle of the freedom of the seas, to acquisition of exclusive rights over them would be merely pedantic. However, it is clear that they cannot be so confined. The exploitation of the subsoil of the sea-bed involves—apart from the possibility of exploiting it by means of tunnels proceeding from under the territorial waters—exploitation by means of works and installations appearing above the surface of the sea. These must constitute some obstacle in the way of unimpaired navigation both by their actual presence and by the necessity of protecting them from negligence or malicious design of passing or approaching vessels. If such installations increase in size and density it may be necessary to prescribe lines of traffic. The various instruments proclaiming rights of sovereignty or exclusive jurisdiction and control over submarine areas include almost invariably the substance of the final proviso in the Proclamation of the United States of 1945 which declares that 'the character as high seas of the waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected'. There is no reason to doubt the sincerity of these assurances.[1] They are not an empty phrase—though they must be read subject to reasonable interpretation, without which these instruments would be deprived of much of their purpose and effect. For the undoubted possibility of interference with navigation on the high seas as the result of installations, and the necessity to protect them, connected with the exploitation of the resources of the subsoil is, essentially, of a limited character. Unless abused, they may offend against the theory but not the true object of the freedom of the seas. Imagination may be tempted to conjure alarming vistas of the high seas crowded with installations impeding navigation and of crippling regulations intended to protect these installations. It may be wise to resist the temptation to picture these perturbing possibilities or to elaborate the legal relevance of methods calculated to minimize the anticipated dangers such as the provision of radar facilities for approaching ships. The essential insignificance of such apprehended dangers reveals itself as soon as we abandon the notion of the freedom of the seas as implying an absolute right to absolutely unimpeded navigation—a conception which, when rigidly applied, may be as obnoxious as the uncompromising doctrine of absolute sovereignty. The possibility of interference with the high seas is disturbing and provides a cause for apprehension only when viewed against the background of a rigid conception of the freedom of the seas impervious to reasonable requirements of economic life and scientific progress. It is in this context that the question of the continental shelf—of submarine areas—raises issues of wider significance for international law and the method of its development and adaptation to new conditions. The subject of the freedom of the seas which, next to diplomatic immunities, is the most typical example of customary international law is particularly well calculated to shed light on this general problem of international law.

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[1] See Hackworth, op. cit., p. 677.

For there are two parallel streams, both clearly discernible, in the history of the freedom of the seas in the last three centuries. The course of the first has been determined by insistence, averse to compromise, on the full right of freedom from any kind of interference. Governments have resisted attempts to extend the right of visit and search by foreign warships in time of peace even when the concession of such right was necessary to render effective the object of international conventions in matters such as the prevention of trade in slaves or the protection of fisheries. Thus, with regard to the first, the Brussels General Anti-Slavery Act of 1890 did not merely circumscribe narrowly the area of its operation and the type of vessels, the tonnage of which should not exceed five hundred, to which it applied. The part of warships authorized to assist in the execution of the treaty was limited to verification of the flag and, in cases of suspicion, to bringing the arrested vessel before a court of her own jurisdiction. Similarly, with regard to policing of fisheries, as in the case of the North Sea Fisheries Convention of 1882, the powers of the supervising warships were severely limited. The governing rule, with regard to verification and search by warships in time of peace, is still that any interference by a man-of-war with a vessel flying the flag of a foreign country takes place at the risk and subject to the strict accountability of the state to which the warship in question belongs. The right of hot pursuit, without which the enforcement by the state of its protective jurisdiction within its territorial waters tends to become nugatory, was not finally established without substantial opposition and qualifications. In the Behring Sea Arbitration Sir Charles Russell still referred to hot pursuit as being 'not a strict right by International Law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the laws of a friendly nation'.[1] As late as 1902, Dr. Asser, arbitrator in the case of *The James Hamilton Lewis* and *The C. H. White* between the United States and Russia, used language to all appearance questioning the existence of the right[2] of hot pursuit. In 1935, in the case of *The I'm Alone*,[3] it was given a limited—according to some, unduly limited—interpretation which diminished the apparent value, for the United States, of the Anti-Liquor Treaty of 1924. Even in the matter of piracy it was denied by a distinguished jurist, the French representative at the League of Nations Committee of Experts on Codification of International Law, that a state had a right to try a piratical ship flying the flag of a foreign state.[4] When in connexion with the enforcement of the 18th Amendment the United States approached, in 1922 and 1923, a number of countries with the request to agree to the boarding and searching of their ships within a specified limit outside the territorial waters of the

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[1] Professor François in his *Report on the Régime of the High Seas* submitted to the International Law Commission (A/CN. 4/17, p. 37) seems to share the scepticism, voiced by the Rapporteur of the International Law Commission, as to the value of these assurances. And see his observations at the Session of the Commission in 1950 (A/CN. 4/SR. 66, p. 22).

[1] *Proceedings of the Arbitration* (American ed.), vol. 13, p. 300.

[2] Moore, *Digest of International Law*, vol. i (1906), p. 929.

[3] *Annual Digest*, 1933–4, Case No. 86.

[4] *Minutes of the Third Session*, 1927, p. 45.

United States, some of them resisted the request. It was only when, after the decision of the Supreme Court in *Cunard* v. *Mellon*,[1] the United States proceeded to enforce its law in relation to ships bringing liquor, even if under seal, into the ports of the United States, that an attitude of accommodation made possible arrangements of the nature desired by that country. These arrangements took the form of a number of treaties—the so-called Liquor Treaties—in which the various states, while upholding the principle of the three miles limit of territorial waters, undertook to raise no objection against the boarding and searching of their ships within a zone coterminous with the distance capable of being traversed by the suspected vessel in one hour. Although Great Britain was originally among the Powers which somewhat rigidly resisted the proposed extension of the jurisdiction of the United States,[2] she gave subsequently, in connexion with the attempts to codify the law on the subject, weighty expression to a principle of accommodation and reasonableness indicating in an enlightened manner the possibilities of future development.[3] The Behring Sea controversy between the two countries provided another instructive example of legitimate though rigid resistance to what was believed to be—and was found so in 1893 by the arbitration tribunal—an unlawful encroachment upon the freedom of the seas. Yet it is possible that both the arbitration and the findings of the Tribunal were made feasible only because it was given the power to make recommendations, subsequently accepted by the parties, with regard to a situation in which uncompromising reliance upon the principle of the freedom of the seas was bound to be productive of a disregard of the equitable interests of the coastal state and of the resulting danger of unilateral action.

It is this phenomenon of unilateral action, apparently or actually in conflict with the principle of the freedom of the seas, which constitutes the second, parallel, stream in the practice of states in this sphere. It has found expression in measures which on the face of it are not unreasonable such as the assumption of protective jurisdiction for customs and revenue purposes, for the enforcement of health and sanitation law, and, to a limited extent, for safeguarding the security of the state in time of emergency. These encroachments upon the principle of the absolute freedom of the sea have met with no persistent protests. They have been crystallized in what are generally referred to as claims to the contiguous zone. In contradistinction to the formal extension of the limit of territorial waters, there is now—with some weighty exceptions including, to some extent, Great Britain[1]—a general disposition to recognize the justification of the claim to the contiguous zone for purposes outlined above—as distinguished from the assertion of exclusive jurisdiction for the economic benefit of the nationals of the state. Within these limits the conception of the contiguous zone is now in the stage of approximation to a customary rule of international law. It is essentially grounded in unilateral action. Occasionally, unilateral action—for the very reason that it is unilateral—tends, notwithstanding its intrinsic reasonableness, to assume the form of an innovation so startling as to lay itself open to initial criticism. This was probably, to some extent, the case with regard to the Anti-Smuggling Act adopted by the United States in 1935 and the Proclamation issued by it in 1945 in the matter of fisheries (concurrently with that on the continental shelf). The first contained, *inter alia*, provisions for a 'customs enforcement area' which gave the President the power to proclaim an area extending one hundred nautical miles north and south from the point in which a suspected foreign ship is hovering and including all of the waters sixty-two miles from the coast within the area of two hundred miles thus designated. Within that area, subject to existing treaty obligations, foreign vessels could be boarded and seized.[2] It appears that no protests have been made against the adoption of the Act—a circumstance which is not in itself decisive seeing that, for the purpose of safeguarding rights, a protest is essential at the time of the application of the enactment as distinguished from its adoption.[3] Similarly, there were no protests when in 1945 the United States issued the Proclamation establishing, in principle, conservation zones for fisheries in the high seas contiguous to the coasts of the United States. In that proclamation the United States claimed the right to establish 'explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States' in all areas in which fishing activities 'have been or shall thereafter be developed and maintained by its nationals alone'.[1] With regard to areas in which foreign nationals participated in the fishing activities the regulation and control within the conservation zones was made subject to agreements with the foreign states concerned. The significance of that unilateral action—the manner and propriety of which are referred to below[2]—was enhanced by the declared readiness of the United States to recognize similar action on the part of other states. In a different sphere, the practice of courts of many countries in assuming jurisdiction in the matter of collisions occurring on the high seas irrespective of the nationality of the vessel amounts, to some extent,[3] to a claim of jurisdiction in respect of the high seas—a claim which amounts to an affirmation of the common interest in the maintenance of a régime of order in an area of international concern. At the same time, the very character of unilateral action tends to encourage claims, under the colour of general principle, which are unjustified *per se* and occasionally extravagant to the point of irresponsibility. The student of international law will find no difficulty in recalling examples of such action.

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[1] (1923), 262 U.S. 100.

[2] For the history of the rejection by Great Britain of the original proposals of the United States see Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (1927), pp. 281–7. In 1923 Lord Curzon stated in the House of Lords that 'there is no chance of our agreeing in any circumstance whatsoever to the proposal for a twelve-mile limit' (House of Lords, 5th Ser., vol. 54, cols. 728, 729).

[3] In her reply to the questionnaire of the Committee of Experts on the Codification of International Law in 1929 Great Britain accepted 'the view that no State can be expected to tolerate with equanimity circumstances arising under which, owing to peculiar local circumstances, the absence of jurisdiction over foreign vessels on the high seas immediately contiguous to its territorial waters may prejudice gravely the enforcement of the laws or the well-being of the community within its territory'. She stated that 'where such circumstances arise, it is the duty of any foreign State to come to an agreement enabling the State concerned to exercise such rights of control over the merchant vessels of the foreign State concluding the agreement as may be necessary' and that 'for a State to refuse to enter into an agreement of this kind would be to show an entire absence of the consideration for the rights of other States upon which the solidarity of nations depends' (*Territorial Waters, Bases of Discussion*, pp. 28, 29). In the Behring Sea Arbitration Sir Charles Russell, while agreeing that in similar circumstances other states would probably acquiesce in the enforcement of the law of the coastal state outside the territorial waters, insisted that such enforcement could not be claimed as a matter of right against an objecting state (Moore, *International Arbitrations*, vol. i, p. 903).

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[1] But only to some extent. See above, p. 405. See also the British 'hovering acts', allowed to lapse in 1853. And see for an affirmation, in wide terms, of the principle of contiguous zones *Croft* v. *Dunphy*, [1933] A.C. 156.

[2] For an analysis of the provisions of the Act see Jessup in *American Journal of International Law*, 31 (1937), pp. 101–6.

[3] See above p. 396.

A comparison of these two parallel streams—the insistence, in reliance on established international law, on full freedom from interference by other states with respect to events occurring on the high seas and the unilateral assertion of such jurisdiction—helps to draw attention to a persistent problem, as revealed by the claims to sovereignty over submarine areas adjacent to the coast, of the traditional conception of the freedom of the seas. Its authority and continued usefulness can be safeguarded only if it is acted upon in accordance with its true purpose and the ever valid test of reasonableness. Its true purpose is to ensure freedom of navigation, unhampered by exclusive claims of individual states, and freedom of utilization of the resources of the sea to a degree to which they can be equitably utilized by all. The resources of the submarine areas adjacent to the coast of the state cannot be feasibly and reasonably utilized by all. They can be so utilized mainly by the adjacent coastal state. Similarly the true object of the freedom of the sea is not invariably to prevent its use for the purpose of securing the individual interest of any particular state—provided that that interest is not incompatible with the two essential purposes of the principle of freedom of the seas as here formulated. Neither can it be interpreted as demanding an absolute prohibition of jurisdiction on the part of foreign states or of the community of nations. For that reason unilateral acts such as the Proclamation of the United States of 1945 in the matter of fisheries, although amounting in some way to a claim to exercise jurisdiction on the

[1] For the text of the Proclamation see ibid. 40 (1946), p. 46.

[2] See p. 414.

[3] But only to some extent. In certain circumstances English courts exercise jurisdiction in the matter of torts occurring in foreign territory.

high seas in areas in which fishery rights have hitherto been exercised only by citizens of the United States, may not necessarily be inconsistent with a rational interpretation of the principle of the freedom of the seas so long as its primary object is not the exclusion of nationals of foreign states. The same applies to the assertion of jurisdiction, even though exercised by individual states, for the purpose of safeguarding a general interest. The future development of the law of contiguous zones may, from this point of view, provide a test of enlightened and far-seeing statesmanship of governments. If the freedom of the seas is interpreted so as to result either in a régime of waste or disorder on the high seas—such as must follow from the absence of effective agreement in the matter of protection of fisheries or of pollution of the sea—or in the stifling of properly conceived interests of individual states, its authority will disappear and it will be increasingly flouted by unilateral assertions of selfish and monopolistic interest. The same, with reference to the subject here under discussion, would be the effect of resistance, in reliance on supposed rules of international law, to a limited—and relatively trifling—use of parts of the high seas for the purpose of erecting installations or to reasonable measures of protection of such installations. Writers who speak with special authority on the subject of the law of the sea and who in the past were inclined to look with disapproval at any possible tendency to encroach upon the freedom of the seas are now emphatic in warning against the exaggerations of the 'tyranny' of the traditional conception.[1]

Once the principle permitting the use of parts of the sea for erecting or placing permanent installations for operations on the sea-bed or its subsoil is admitted as valid, its application becomes to a large extent a matter of machinery and procedure. That principle has been acted upon by states which have been responsible for the instruments proclaiming rights in submarine areas and which re-affirmed, in those very instruments, their determination to abstain from action which may impede freedom of navigation. Such affirmation cannot be brushed aside as a meaningless promise incapable of fulfilment and not intended to be fulfilled. It must be regarded as the basis of future development. Undoubtedly, the question of providing the requisite procedure for applying the test of reasonableness in relation to limited encroachments upon the freedom of the seas may not lend itself to an easy solution. The forms of such machinery are a proper object of study by international lawyers. There would appear to be no reason why as between states bound by or willing to accept the obligations of the jurisdiction of the International Court of Justice that tribunal should not, at least not in the initial stages, decide any controversies that may arise and, in doing so, lay down general principles applicable to any similar situations. On the other hand, in case developments should make such disputes a phenomenon both normal and frequent, other organs, partly judicial and partly administrative and expert in character, could properly fulfil that function. Some such organs have in fact been proposed in the past.[1] A machinery of that nature may make possible the evaluation and judicious balancing of the interests involved—for instance, in relation to the question of the admissibility of interference with navigation for the purpose of protecting installations on the high seas. Such organs may be given the power to decide, in any given case, that there is justification for a limited diversion of shipping in order to make possible the exploitation of what may be a valuable oil-field. Evaluation of conflicting interests and the effective recognition of those which, on balance, are entitled to protection is a constant feature of judicial activity as, indeed, of law in general. Witness, for example, the manner in which the Supreme Court of the United States affirmed the right of the State of Massachusetts to make use of the waters of the tributaries of the Connecticut river on the ground that the purpose of the action complained of—namely, the installation of a modern water-supply system in the city of Boston—was superior to the more limited interest of the State of Connecticut in the unimpaired use of its share of the waters of the tributaries in question.[2]

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[1] See Gidel, *La Plataforma continental ante del derecho* (Lectures delivered in the University of Valladolid, 1951), p. 161. He says: 'The concept of the freedom of the high seas has now lost the absolute and tyrannical character imposed upon it by its origin as a reaction against claims to territorial sovereignty over the high seas.' These and similar passages are a literal translation of the corresponding passages in the Memorandum of the Secretary-General of the United Nations (referred to above, p. 377) and they permit therefore uninference as to the authorship of the latter. For the more conservative views of Professor Gidel prior to the rise of the problem of submarine areas see above, p. 400.

Machinery as indicated may also be useful—though it is not essential—for the solution of the problems connected with the determination of the submarine areas either between directly adjacent states sharing the same coast-line, as in the case of Mexico and the United States in the Gulf of Mexico, or in the case of states on opposite coasts, such as Saudi Arabia and Iran in the Persian Gulf. As between the former the problem is to a large extent similar to that involved in the delimitation of territorial waters between neighbouring states.[3] As between the latter the analogy of boundary lakes rather than of boundary rivers—i.e. the emphasis on the middle distance rather than the mid-channel (the *thalweg*)—may be helpful as embodying a solution dictated by common sense. However, for that very reason, such analogy can be no more than of initial usefulness with respect to what is essentially a novel situation. As adumbrated in the various proclamations, the delimitation can properly be effected by reference to equitable considerations, and any formula based on a system of median[1] and lateral lines[2] ought to be no more than the starting-point in search for an equitable solution—except that for reasons both of convenience and established principle[3] the low-water mark may properly be deemed to be the basis for the determination of the boundary. The problems involved may become particularly complicated if islands belonging to one state are situated within the area of the continental shelf (or of appropriated submarine areas generally) of another state. For such islands, or groups of islands, have not only territorial waters of their own; the state to which they belong may claim the continental shelf (or its equivalent) appurtenant to the islands in question. A further technical problem of considerable potential importance and complexity, requiring adjustment and regulation, will arise in connexion with the existence of pools of deposits situated across the surface boundaries of the respective submarine areas.[4] However, these are not problems directly connected with the question of the freedom of the seas in relation to submarine areas. But there are two aspects of the question which bear intimately upon the subject here discussed.

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[1] For a survey of some of these proposals see Higgins and Colombos, *The International Law of the Sea* (1943), pp. 282, 283.

[2] *Connecticut* v. *Massachusetts* (1931), 282 U.S. 660.

[3] See on boundaries through territorial waters Boggs, *International Boundaries* (1940), pp. 184–91. See also, with regard to the continental shelf, the Memorandum of the Secretary-General (cited above, p. 377), pp. 101, 108 and Vallat in this *Year Book*, 23 (1946), p. 336. For an instance of a regulation of the boundary in territorial waters see 18 & 19 Geo. V, c. 23, approving the agreement with the Sultan of Johore with regard to territorial waters between the Straits Settlement and the State of Johore.

The first is that of the legal status of the installations erected on the high seas for the purpose of exploring and exploiting the sea-bed and the subsoil. While no dogmatic interpretation of the principle of the freedom of the seas ought to be permitted to prevent the erection and protection of such works and installations, care must be taken lest they, in turn, become an occasion for wide claims derogatory to the freedom of the seas. This might, in particular, be the result of attempts to treat such installations as assimilated to islands and as such entitled to territorial waters (and possibly also to surrounding submarine areas) of their own. The question of territorial waters around artificial islands and lighthouses is far from settled.[1] Whatever may be the existing or future law on the subject, it is clear that works and installations erected on the surface of the sea in connexion with the exploration and exploitation of the sea-bed and subsoil are not entitled—and properly ought not to be entitled—to territorial waters (and, *a fortiori*, to submarine areas) of their own. They are on the high seas as licensees, as it were, by dint of a liberal interpretation of a hitherto rigid principle. They are normally in any case in a category different from that of artificial islands created in shallow waters by means of walls surrounding the projected elevation.[2] To some extent any controversy in this connexion as to artificial islands may in itself be unreal. For in so far as they are thought of as being within the area of the continental shelf of any state, they cannot properly be constructed there without interfering with the existing continental shelf, which includes the bed of the sea, of that foreign state. In so far as they are situated in the proximity of the coast within the area of the continental shelf of the coastal state they can make no difference in the legal situation. They may become relevant if they are thought of as situated on the outward fringe of the submarine area, i.e. at a great distance from the coast—a problem of distinctly limited practical importance. In any case, it seems inadmissible that artificial installations, the authorization for which is based on an exception, should become the starting-point for appropriation, in the literal sense, of parts of the high seas.[3] If the submarine areas in question are large and the installations numerous and scattered, the territorial waters round them might cover substantial parts of the sea. Undoubtedly, such installations must be protected and there may, on that account, ensue limited interference with the freedom of navigation. However, there is all the difference between that incidental result and the subjection of large portions of the high seas to the territorial sovereignty of the state in question. The International Law Commission had no difficulty in discarding any such solution. In its provisional report to the General Assembly in 1950 it stated that 'for works and installations established in the waters of the high seas for working the sea-bed and subsoil, special security zones might be set up, but they could not be classed as territorial waters.'[1] Artificial installations on the high seas for the purpose of exploiting the resources of the bed of the sea are not artificial islands partaking of the nature of territory. An authoritative affirmation of that rule may serve the useful purpose of discouraging the abuse of the notion of the continental shelf and of submarine areas for purposes alien to their legitimate purpose.

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[1] I.e. a line of which every point is equidistant from the low-water mark (see below, n. 3) of the coast of the littoral states concerned.

[2] I.e. a line extending from the termination of the land boundary of the coastal state. For a valuable study of the subject see Boggs in *A.J.* 45 (1951), pp. 240-66.

[3] See, e.g., Oppenheim, *International Law* (7th ed., 1948), § 199 (3), where it is stated that 'it is . . . certain that the boundary line runs not nearer to the shore than three miles or one marine league, from the *low-water mark*'.

[4] The problem has arisen repeatedly in the United States in the relations of adjoining owners of oil deposits. It has found expression, among others, in the so-called 'rule of capture' according to which the owner of a tract of land acquires title to the oil or gas which he produces from wells drilled there even if it can be proved that part of such oil or gas migrated from adjoining lands. The rule as originally applied was based on the principle that an owner of a well had the privilege of using and wasting the product as he saw fit regardless of injury to his neighbour or of depletion of valuable natural resources. That principle does not recognize correlative rights in an underground reservoir but accords to each well-owner an unlimited right of exploitation. It was only gradually and after irretrievable harm had been done to the industry that courts enunciated limiting principles such as that there must be no deliberate waste to the injury of the neighbour and that the owner must not wantonly perform acts injurious to the common reservoir or calculated to destroy it. Administrative regulation has worked in the same direction. Attempts have been made to pass compulsory unitization statutes according to which all surface lessees over a given reservoir agree to treat their properties as a single unit. These have not been wholly ineffective in stemming the irresponsibility of unbridled competition. An authoritative writer has summarized in the following passage the results of the situation which is bound to arise in regard to such boundary areas within a state which has no machinery required for the public regulation of problems of this nature: 'It may be impossible for our successors to believe that in the space of less than a century our system of laws allowed the loss of an essential resource and a resort to substitutes; that our people voluntarily submitted to the process; and that the industry was helpless to avoid it' (Northcult Ely, 'The Conservation of Oil' in *Harvard Law Review*, 51 (1937–8), p. 1244). It will be noted that the phenomenon of common pools independent of political boundaries is relied upon in the recitals of the Proclamation of the United States of 1945.

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[1] See Johnson in *International Law Quarterly*, 4 (1951), pp. 203–15.

[2] For an example of such islands see the inquiry, referred to above on p. 400, addressed in 1918 to the Department of State. It is difficult to assess the degree of the probability of such structures being erected to an extent warranting their detailed examination. In general it would seem that the considerations adduced in the text above in the matter of artificial installations must apply to artificial islands. With regard to the delimitation of the continental shelf considerations both of equity and convenience would seem to require that such artificial islands should be disregarded not only when they are situated within the continental shelf of another state but also in so far as they are calculated to impinge upon the legitimate continental shelf of a foreign state or states.

[3] For this, and other reasons, such installations are even less entitled to territorial waters of their own than lighthouses, with regard to which the better and almost generally accepted opinion is that they are not entitled to territorial waters. See Oppenheim, op. cit., vol. i (7th ed., 1948), p. 454: 'Just as a State may not claim sovereignty over a maritime belt around an anchored lightship, so it may not make such a claim in the case of a lighthouse in the open sea.' See also West-

Secondly, the claim to sovereignty over submarine areas may be—and has been—abused for the purpose of advancing pretensions to sovereignty over the high seas as such or the exclusive exploitation of their resources. Pretensions of that nature are wholly external to the apparent occasion which prompted them. It was perhaps unfortunate that the United States on the day on which it issued the Proclamation as to the continental shelf also issued the Proclamation relating to the conservation zones in the matter of fisheries.[2] Whatever may have been the propriety of the latter, it was independent of the claim to the continental shelf. Yet some states, in following the apparent example of the United States, have combined in the same instrument the claim to the adjacent submarine areas with sweeping assertions of sovereignty over the high seas. While Mexico did no more than join in one proclamation the substance of the two separate proclamations of the United States, some other states went substantially beyond that.

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lake, *International Law*, vol. i (1st ed., 1904), p. 186, for a criticism of Sir Charles Russell's suggestion, in the contrary sense, made in the course of the Behring Sea Arbitration in 1899; Gidel, op. cit., vol. iii, p. 696; Jessup, *The Law of Territorial Waters* (1927), p. 69; Hyde, op. cit., vol. i, p. 485, who points out that the erection of a lighthouse on a submerged rock in the high sea 'does not confer upon the State that erects and maintains it the privilege of making valid claims to the surrounding waters as territorial'. See, however, Johnson, referred to above (p. 411, n. 1). It is understood that the British legal and other authorities regarded, and still regard, the Eddystone lighthouse as entitled to territorial waters of its own. It is not believed that installations for underwater drilling would, in any case, come within the observation made by sub-committee No. 2 at the Hague Codification Conference in 1930 which stated that 'the definition of the term "island" does not exclude artificial islands provided these are true portions of the territory and not merely floating works, anchored buoys, etc.' (*Act of the Conference*, vol. iii, p. 219).

[1] Loc. cit., p. 22. The Commission followed in this report the recommendations contained in the Report submitted in 1950 to the Copenhagen Conference of the International Law Association by its Committee on Rights to the Sea-bed and its Subsoil. See Summary Record of the Meeting of the Commission of 17 July 1950 (A/CN. 4/SR. 69, pp. 11, 12).

[2] See above, p. 407.

Thus Chile, in addition to proclaiming sovereignty over the continental shelf, 'confirmed' and 'proclaimed' national sovereignty over the adjacent seas of whatever depth to 'within the limits necessary in order to reserve, protect, preserve and exploit the natural resources of whatever nature found on, within and below the said seas'. The proclamation of Peru and of Costa Rica was to the same effect and in almost identical language. In the case of those countries the only connexion between the assumption of sovereignty over the continental shelf and the assertion of sovereignty over the adjacent sea is that both are contained in the same instrument. It will also be noted that, in the case of those states, the claim to sovereignty over the high seas is limited to the protection and exploitation of its natural resources. The problems raised by the inconsistency with international law—which inconsistency is not open to doubt—of these claims to sovereignty over the high seas, even if only for limited purposes, fall outside the scope of the present article. They are referred to here as an example of action which by the extravagance of the underlying claim—even if explained by the differing importance attached in various countries to emphasis of language—tends to cast doubt upon the reasonableness and justification of the claim to submarine areas. Some other countries have gone beyond these proclamations and have asserted sovereignty over the adjacent seas generally and not merely for limited purposes. Thus Article 7 of the Constitution of El Salvador of 1950 provides, in language of some simplicity, that the territory of the Republic 'includes the adjacent seas to a distance of two hundred nautical miles from low-water mark and comprises the corresponding aerial space, subsoil and continental shelf'. Although the same article expressly laid down that its provisions 'do not affect freedom of navigation in conformity with the accepted principles of international law', it is clear that the claim thus made was contrary to international law. For the freedom of the sea comprises other freedoms in addition to that of navigation. Moreover, as stated in the communication of the Government of the United States addressed to the Government of El Salvador and expressing the former's 'deep concern' at the implications of this provision of the Constitution, the disclaimer of the intention to interfere with the freedom of navigation, when coupled with an assertion of sovereignty, 'might be claimed to be a privilege granted by El Salvador rather than based on a right derived from international law'.[1]

As stated, this association of the assumption of title over submarine areas with sweeping claims to sovereignty over the high seas is mischievous in its results and must therefore be a cause for regret. This is so not only because these claims are in themselves contrary to international law, but also because they tend to cast doubt upon the justification of the claim to submarine areas and its essential conformity with international law. For, it has been shown, there is no principle of international law—and certainly no principle of international practice—which makes the submarine areas share automatically the status of the high seas. Unlike the latter, they are not *res omnium communis*. To that extent they can, consistently with the rules of international law in the matter of acquisition of territorial title,[1] become subject to the sovereignty of the state—though not of every state. They are not *res nullius*. The more difficult question, namely, whether their exploitation, when originating from the surface of the sea, unavoidably necessitates activities which are inconsistent with the freedom of the sea, must be answered in the negative. There is no difficulty in reaching that answer once we abandon a conception of the freedom of the seas which is both rigid and pedantic.

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[1] Communication of 12 December 1950 addressed to El Salvador (*Bulletin of State Department*, 24 (1950), p. 24).

However, that very factor as well as the apparent novelty of the claim to submarine areas make it incumbent upon states which have asserted such a claim to explain, in all requisite detail, the propriety of the action taken. The proclamation of the United States in the matter of the continental shelf went a long way in the direction of supplying what may be called the philosophy of the new doctrine in terms of national and international interest, of modern scientific progress, and of geographical propinquity which make the utilization of the resources of the submarine areas by the coastal state feasible and essential. The recitals of the proclamation gave lucid expression to these considerations. The proclamations of other states followed the example of the United States in explaining to the world the considerations which led to the new departure. In thus giving an explanation for their action they appealed to the test which is decisive in relation to the freedom of the sea, namely, the test of reasonableness and of legitimate common and particular interest. For unless the exploitation of submarine resources is to become a source of friction, disorder, and uncertainty, it must be placed in the hands of the coastal state. This is also a solution most consistent, as a rule, with economic considerations. Moreover, it is the only solution compatible with the security of the coastal state. The coastal state cannot be expected to tolerate permanent installations, of potential military importance and erected by any state however distant, in the neighbourhood of its maritime frontier. All these factors are of importance as great as the circumstance that the appropriation of submarine areas has become part of international practice—including that of the two principal maritime states—accompanied by general acquiescence. To that extent the admissibility of sovereignty over submarine areas is no longer a matter to be determined by purely doctrinal considerations. Such sovereignty has been declared by international practice to be part of the law and international lawyers can no more prevent—or retard[1]—the consequential developments than they were able to impede the adoption of the principle of the full sovereignty of the state over the air above its territory. Neither is it necessary for them to adopt an attitude of obstruction or discouragement or circumlocution, for example, by suggesting that what has been acquired as the result of the proclamations in the matter of submarine areas is not a right over them but an exclusive right to occupy them.[2] For international law, reasonably interpreted, is not inimical to these developments. At the same time its principles, unhampered in their efficacy by an endeavour to obstruct changes consistent with the freedom of the sea, may continue to fulfil the useful function of checking abuses and excessive claims divorced from the true purpose and the true justification of these developments.

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[1] See below, pp. 415–22.

VII. *'Occupation' of submarine areas*

It has been suggested that, regardless of the form of words used, the rights of exclusive control and jurisdiction claimed in the submarine areas are rights indistinguishable from sovereignty.[3] It has also been submitted that such rights are not inconsistent with the reasonably interpreted conception of the freedom of the seas. We may now inquire what, in addition to the decisive test of reasonableness[4] and the fact of its having become part of the practice of states, is the legal basis of the asserted title, conceived as a territorial title, to submarine areas. The main argument, other than that based on the freedom of the seas, which has been raised against the acquisition of title over submarine area is that international law requires effective occupation as a condition of valid acquisition of territorial title and that no such effective occupation is possible with regard to submarine areas. That argument is based on two assumptions. The first is that the principles applicable with regard to acquisition of title over territory apply, automatically and without modification, to the novel case of the submarine areas. The second is that effective occupation is, according to international law, invariably and rigidly a condition of acquisition of territorial sovereignty. Both these assumptions are unwarranted.

Any attempt to base the title to submarine areas on the accepted notion of effective occupation must result either in a denial of the legality of the title thus claimed or in depriving the notion of effective occupation of its natural meaning. For it is clear that in all cases in which the title to submarine areas has been proclaimed there has been no approximation to effective occupation. There has been only a proclamation and, in some cases, a conferment of concessions in respect of the areas in question. This absence of effective occupation is in no way fatal to acquisition of territorial title over submarine areas. For modern international practice does not invariably consider effective occupation to be a condition of acquisition of title. As it is occasionally put in a more circuitous fashion, the requirement of effectiveness of occupation is a matter of degree. Even that attenuated condition of effectiveness represents an over-simplification of the true legal position. What is true is that, *all other things being equal*, effective occupation constitutes, except as against the lawful sovereign, a title superior to any competing title. To that extent—but to that extent only—is it possible to consider as accurate the statement that international law has discarded discovery, purely symbolic occupation (which does not differ in nature from pretensions based on mere discovery) and similar claims, including that of contiguity, as a valid source of territorial title. Thus in modern international judicial practice the border-line between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration. In the judgment given in 1933 in the case between Denmark and Norway concerning the *Legal Status of Eastern Greenland* the Permanent Court of International Justice, after laying down the general principle that a claim to territorial title based upon continued display of authority must show 'the intention and will to act as sovereign, and some actual exercise or display of such sovereignty', proceeded to qualify very substantially the requirement of 'some actual exercise or display' of authority. It said:

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[1] There may perhaps have been an element of exaggeration of the power of lawyers in Professor Hudson's observation at the Session of the International Law Commission in 1950 that 'lawyers had no right to prevent the exploitation of those resources for the benefit of mankind' (A/CN. 4/SR. 66, p. 24).

[2] See below, p. 420.

[3] See above, pp. 387 et seq.

[4] See above, p. 414.

> 'It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.'[1]

The principle that the requirement of 'some display of authority' may be reduced to the bare existence of a claim was shown clearly in the way in which the Court dealt with the title of Norwegian Kings in the sixteenth century, from which the Danish title was subsequently derived:

> 'That the King's claims amounted merely to pretensions is clear, for he had no permanent contact with the country, he was exercising no authority there. The claims, however, were not disputed. No other Power was putting forward any claim to territorial sovereignty in Greenland, and in the absence of any competing claim the King's pretensions to be the sovereign of Greenland subsisted.'[2]

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[1] *P.C.I.J.*, Series A/B, No. 53, pp. 45, 46.

[2] Ibid., at p. 48.

Moreover, the Court held, with regard to the much later period between 1721 and 1814, that as there had been no claim to sovereignty by any other Power, and in view of the arctic and inaccessible character of the uncolonized part of the country, mere acts of legislation were sufficient evidence of effectiveness. Neither was the Court prepared to exact a substantially higher degree of effectiveness with regard to the modern period covering the nineteenth and twentieth centuries and immediately preceding the dispute. It considered as sufficient such manifestations of display of sovereignty as acts of legislation concerning navigation in the seas round Greenland and the conclusion of commercial agreements referring to Greenland.

Even less exacting, if possible, in the matter of the requirement of effectiveness, was the award by the King of Italy, acting as Sole Arbitrator, in the *Clipperton Island* case between France and Mexico in 1931. That case is occasionally referred to as an example of the elasticity of the notion of occupation. Upon analysis, it is an instance of a situation in which international law dispenses altogether with the requirement of effectiveness. In that case the actual display of state activity by France consisted in the drawing up, by a Lieutenant of the French Navy, acting upon instructions of the French Minister of Marine, of a proclamation of French sovereignty over the island; in taking geographical notes; in an unsuccessful attempt to reach the shore; and, in 1897, in an inquiry addressed to the Government of the United States as to the activities of certain American citizens in connexion with the island. The Arbitrator decided that the island belonged to France. After holding that 'the actual, and not the nominal, taking of possession is a necessary condition of occupation', he proceeded to base his decision on the rule that 'if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby established'.[1] Yet it is clear that there was in this case nothing in the nature of an initial taking of possession in the ordinary sense of the word. There was a symbolic act, a proclamation. Such symbolic act cannot, without doing violence to language, be regarded as occupation. The *Clipperton Island* case shows that the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title.[2] Such areas are not only those which are uninhabited, but also those which are normally uninhabitable.

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[1] *Annual Digest*, 1931–2, Case No. 50.

[2] As Professor Dickinson put it, in 1933, in his analysis of the award: this retention of the term 'occupation' in such cases provides 'adequate criteria for determining the ownership of such parts of the earth as still remain unclaimed and unexploited'. Among these parts of the earth he included 'the unexploited lands that lie under the sea' (*American Journal of International Law*,

The judicial and arbitral decisions referred to above demonstrate the advisability of viewing the principle of effectiveness against the background of the historic circumstances which gave rise to it. It was conceived as a check upon the fanciful arbitrariness of pretensions inimical to a reasonable apportionment of the normally inhabitable territorial domain of the world and productive, by their very excess, of uncertainty and friction. But it is not a magic formula applicable to all situations. If so applied it can be maintained only by dint of being used, in the end, in a sense contrary to its natural connotation. The futility of the mechanical application of the notion of effectiveness was demonstrated in an instructive manner in the discussions preceding the general recognition of the sovereignty of states over the air. It was argued by international lawyers of distinction that as the air is incapable of effective occupation it was incapable of appropriation. To speak of occupation of submarine areas is to use language even more unreal than that referring to occupation, as a basis of territorial title, of arctic and antarctic regions. States have indeed put forward claims—not altogether uncontroverted—to the latter, but they have not based them on any principle germane to occupation, effective or fictitious.[1] In doing so they have by implication rejected the notion of occupation as an invariable basis of title. The same applies to the various proclamations relating to submarine areas. There is no element of occupation, in a sense consistent with the ordinary meaning of the word, in the British proclamations concerning the continental shelf in the Bahamas, Honduras, Jamaica, and the Falkland Islands. To say that a proclamation amounts to occupation, or that it constitutes the first step to occupation giving an 'inchoate title'[2] is, in fact, to deny that occupation is necessary. A proclamation is a means by which a title, claimed or acquired, is announced. It is not a *source* of a title or a means of acquiring it. That does not mean that it is meaningless or unnecessary. When the Rulers of various Sheikdoms in the Persian Gulf were advised in 1949 by the British authorities that the issue of a proclamation is a pre-requisite of their effective assertion of rights over the adjacent submarine areas, the advice was given in deference to an obvious proposition of order and orderliness which requires that a person—or a state—asserting a claim, however inherently valid, must make his claim

27 (1933), p. 133). For modern examples of claims by Great Britain and the United States based on purely symbolic occupation see the interesting article of Orent and Reinsch, ibid., 35 (1941), pp. 443–61. The late Professor Decencière-Ferrandière came to the conclusion, in an exhaustive study, that 'la limitation de l'effet des occupations au territoire effectivement occupé . . . ne fait plus partie du droit international positif' (*Revue de droit international et de la legislation comparée*, 3rd ser., 18 (1937), p. 662).

[1] See below, p. 431.

[2] As to which see below, p. 421.

known by a formal pronouncement or notification. This is so especially if the subject of the claim in question is novel in character, undefined in extent, and likely to require determination in relation to similar claims by other persons or states. Accordingly, the issue of the proclamations of the continental shelf in no way militates against the view that they were of declaratory character in relation to what was considered to be a title claimed or acquired by or belonging to the state by reference to a legal basis other than occupation.

The International Law Commission not only put on record, in its Report to the General Assembly in 1950, its view that the exercise of control and jurisdiction over the continental shelf 'was independent of the concept of occupation'.[1] It had previously adopted a text stating that 'the submarine area (sea-bed and subsoil) of the Continental Shelf off the coast of a littoral State and outside the area of its territorial waters is subject *ipso jure* [*sc.* without a proclamation] to the control and jurisdiction of the littoral State'.[2] The Commission had no difficulty in thus disposing of the idea of 'notional occupation' which in effect amounts to a denial of the necessity of occupation. In the long run little purpose is served by adhering to words deprived of their content. Those who, apprehensive of the seemingly limitless comprehensiveness of the rival doctrine of contiguity,[3] are inclined to see in occupation the only legitimate mode of acquiring title to submarine areas, find themselves in a dilemma which can be solved only by dint of a verbal nicety. As no effective acts of occupation (in the ordinary sense of the word), concurrently with the act of proclamation of title or at any ascertainable period in the foreseeable future, are possible in relation to contiguous submarine areas, it is found necessary to fall back upon the barest minimum of occupation which reduces occupation to a shadow of its natural meaning, namely, to a proclamation and, possibly, the granting of concessions. But this is the very question which is at issue, namely, whether the state is in the position to rely on a valid legal basis and title for issuing the proclamation and the granting of concessions. There is little persuasive force in an attempt at juridical analysis which proceeds, in effect, as follows:

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[1] Op. cit., p. 22.

[2] A/CN. 4/SR. 68, p. 13. Professor Brierly expressed the correct position in clear terms: 'If this right [of sovereignty] belonged *ipso jure* to the littoral State, there was no necessity for the latter to make any claim or annexation. Such a proclamation or annexation might of course serve to indicate that a State had begun to work its zone of control, but legally it was not necessary' (ibid., p. 6). On this point, apparently, the Commission was not prepared to share the indecision of the Report of the Committee of the International Law Association in 1950. That report stated, in the text, that 'control and jurisdiction over the sea-bed and subsoil of the continental shelf outside territorial waters can be vested in the coastal state by effective occupation'. However, a footnote attached to the text stated that 'it is not the intention of the Committee that affirmation of this principle should be interpreted as a rejection of the possibility that control and jurisdiction over the sea-bed and subsoil of the continental shelf outside territorial waters vest *ipso jure* in the coastal state or that they can be vested in the coastal state by a proclamation to this effect'.

[3] See below, p. 430.

'The State is entitled to issue the proclamation annexing the continental shelf and to grant concessions over it if it occupies it to the extent of issuing the proclamation and granting concessions.' The tautologous nature of the solution emphasizes its essential unhelpfulness. For the same reason it seems unhelpful to answer the question whether a state is entitled to exercise sovereignty, i.e. display state activities, by explaining that it is entitled to do so if it displays state activities, by legislating, granting concessions, and concluding treaties.[1] There would be an element of consistency—though, it is believed, of misguided consistency—in the view that as the occupation of submarine areas is impossible there can be no title over them. But there is probably no more than dialectics in the attempt to combine the requirement of occupation with a denial of it by reducing it to a formal claim in the form of a proclamation.

However, the defect of the attempt to base the title to submarine areas on occupation is not only one of logic. If 'occupation' thus conceived were the true basis of the legal claim to the adjacent submarine areas then there would be nothing—save the extra-legal remedies of intervention or self-preservation on the part of the coastal state—to prevent distant and strategically and economically powerful states from 'occupying' the adjacent submarine areas of other states by proclaiming their annexation and by emphasizing the 'effectiveness' of the title thus claimed to have been acquired by granting concessions, by legislating in respect of them, by concluding treaties—with states willing to do so—relating to the submarine areas thus acquired, and, eventually and after a long period of uncertainty, to proceed to the actual exploitation, possibly in active competition with other states, of the submarine areas in question. Wide and disturbing possibilities of friction would thus be opened not only as between the coastal state and its more or less distant neighbours but also between the neighbours themselves. These possibilities are probably present to the minds of the adherents of the 'occupation doctrine'; for eventually they fall back upon contiguity. However, there may be an element of artificiality in an argument which starts from the proposition that 'contiguity is a dangerous doctrine unless confined within the principle of effective occupation'[2] and ends by reducing the 'effective occupation' to a proclamation which, however, can be issued only by the coastal, the contiguous, state. It may be essentially unhelpful to rely, as a check upon exorbitant claims of contiguity, on the doctrine of occupation—of effective occupation—and to proceed to argue that the effectiveness required is the effectiveness of 'a symbolic act of appropriation in the form of a proclamation' which can issue only from the coastal state. It may be tempting, in that predicament, to invoke the authority of the Permanent Court of International Justice in the case of the *Legal Status of Eastern Greenland*, as well as the award in the case of the *Clipperton Island* case, as supporting the proposition that full effectiveness of occupation is not essential. Actually these decisions demonstrate more than that. They show that there are situations in which occupation, in the normal meaning of the words, is not required at all and in which the conception of occupation is a more or less deceptive figure of speech. If this is so with regard to inhabited or sparsely inhabited territory, it is particularly true in relation to uninhabitable areas such as the sea-bed and its subsoil.

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[1] It may perhaps be deceptive to rely, in support of that view, on the judgment, referred to above, of the Permanent Court in the *Eastern Greenland* case. There is all the difference between the Court holding, retrospectively, that legislation, conclusion of treaties relating to the territory, and the granting of concessions constituted, *in the absence of an adverse claim*, sufficient evidence of effectiveness, and relying on such manifestations of state activity as conferring title, *pro futuro*, in respect of a controversial situation.

[2] Waldock, 'The Legal Basis of Claims to the Continental Shelf'—a paper read before the Grotius Society in April 1950 and to be published in vol. 36 of the *Transactions* of the Society. This paper, which is an important contribution to the subject, was also published as an annex to the Report of the Committee of the International Law Association in 1950.

Neither can the difficulty be obviated by relying on the somewhat nebulous notion of 'inchoate title' as applied to claims based on discovery. The latter, it has often been said, gives an 'inchoate title' which must be confirmed by use and settlement[1] and which is lost if not thus confirmed. The doctrine of 'inchoate title' has often been invoked in diplomatic correspondence and arbitral proceedings[2] and has been the subject of an occasional judicial *dictum*. In the only arbitral decision in which it was directly applied—namely, in the *Island of Palmas* arbitration—it was applied in the sense that the 'inchoate title' was held to have lapsed in view of the proved adverse claim based on effective occupation.[3] In the nature of things there can be no question, in the matter of submarine areas, of any loss of the 'inchoate title' by adverse occupation by another state. The very object of the proclamation is to make such adverse occupation impossible. Can it be said that the 'inchoate title' over the submarine areas will be lost if it is not followed by actual exploitation or exploration? To whom will it be lost? What is the reasonable period within which such exploitation or exploration must materialize? With regard to 'inchoate title' generally, writers have discussed the question whether some such period as twenty-five years is sufficient.[1] Hall, in a careful treatment of the subject, suggested that an 'inchoate title' is good, as against another occupying state, for such time as 'allowing for accidental circumstances or moderate negligence, might elapse before a force or a colony are sent out to some part of the land intended to be occupied'[2] and that 'in the course of a few years the presumption of permanent intention afforded by such act dies away'. The quotation shows the degree of the applicability of the doctrine of inchoate title to submarine areas. Will the granting of concessions—a measure easy of accomplishment—suffice to perfect or keep alive the title? If not, within what period must the concession be followed by operations which are not purely nominal? That question can be put even more pertinently in relation to 'exploration' conceived as a manifestation of an effective exercise of the right of occupation. What international or national authority will exercise the power of exacting the penalty for inefficiency or failure?[3] These questions could be multiplied. They are sufficient to show the inadequacy of the notion of 'inchoate title', conceived for entirely different circumstances, to a situation in which international law, if it is to be of assistance, must supply the necessary element of precision and stability as distinguished from an infusion of uncertainty and potentialities for conflict.

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[1] See Moore, *Digest of International Law*, vol. i (1906), p. 258.

[2] For some references see Moore, op. cit., pp. 259–61, and Lindley, *Acquisition and Government of Backward Territory in International Law* (1926), pp. 136–8.

[3] The arbitrator said 'Throughout the nineteenth century there prevailed the principle that an inchoate title of discovery must, in order to be productive of definite title, be completed within a reasonable period by effective occupation. . . . No act of occupation nor any exercise of sovereignty by Spain at Palmas Island had been alleged. Even if it were possible to admit that the Spanish title still existed as an inchoate title in 1898 and as such passed over to the United States, such inchoate title could not prevail over continuous and peaceful display of authority by Holland' (*Annual Digest*, 1927–8, Case No. 1).

On the other hand, it is possible to use in this connexion the term 'inchoate title' in a specific connotation different from that with which it is usually associated. It is possible to say that the littoral state is entitled *ipso jure* to the adjacent submarine areas, but that so long as it has not perfected its title by claiming it formally through the issue of a proclamation, declaratory of an existing right, the title is merely 'inchoate'. The language thus used may not be wholly devoid of artificiality inasmuch as it identifies the dividing line between a full and an 'inchoate' title with a purely formal act which can be accomplished with a stroke of the pen. However, there is room for the argument that there is no compelling necessity in relation to an entirely novel situation to use terms in full conformity with their accepted meaning. Moreover, the formula may be useful inasmuch as it emphasizes the importance of and necessity for an express declaration even if conceived as a purely formal act.[4]

The theory of occupation as the legal basis of the claim to submarine areas has been favoured largely for the reason that it supplies an alternative to exorbitant and altogether undefinable claims based on contiguity and continuity. However, it may be a mistake to attempt to provide a legal basis for new problems in international law in such a way as to eliminate all possibility of abuse. No legal doctrine can by itself do away with that possibility. There is no compelling necessity to conjure dangerous vistas of unchecked nationalistic expansion following in the wake of the principle of contiguity. Such expansion—which, in terms of law, must remain a *brutum fulmen*—can equally well take place on the purported basis of fictitious and nominal, of 'notional', occupation. The claim to sovereignty or to exclusive rights over the high seas is unlawful whether it is put forward under the colour of contiguity or occupation accomplished by an act of appropriation in the form of a proclamation or enactment. The claim to territories already occupied or administered by another state is as groundless when put forward by reference to contiguity as it is when advanced by reference to notional occupation in the form of a proclamation or a prior title based on discovery. In so far as occupation means effective occupation—and that is its only natural meaning—it is not applicable to the continental shelf and to submarine areas generally.[1] In so far as it is used in a figurative sense, i.e. as a mere claim to be substantiated by no more than a proclamation or a similarly nominal act such as the granting of concessions it is as elastic and as open to abuse as the doctrine of the contiguity of the coastal state. The latter, at least, has the merit of using terms in their ordinary connotation. It will now be considered to what extent that doctrine has in actual practice been made the basis of the assumption of title to submarine areas and to what extent such practice can find support in the notion of contiguity and continuity as reasonably adapted to the circumstances of the case.

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[1] See Von der Heydte in *American Journal of International Law*, 29 (1933), pp. 461, 462 for a survey of some of the periods suggested.

[2] *International Law* (3rd ed., 1890), p. 106.

[3] In the course of the deliberations of the International Law Commission in 1950 Professor Hudson expressed the opinion that the rights over the continental shelf should not belong to the state *ipso jure*, but 'should be subject to the exercise of the right for the purposes of exploring and exploiting the continental shelf' (A/CN. 4/SR. 68, p. 14). The Commission did not adopt that view.

[4] See above, pp. 418–19.

VIII. *Contiguity as the legal basis of sovereignty over submarine areas*

The inadequacy of the notion of occupation as the basis of the legal right to the submarine areas brings into prominence the alternative solution, namely, that of the principle of contiguity or, which is probably the same, of continuity.[2] In so far as the various proclamations and enactments have attempted to specify the legal grounds on which they are based, most of them have invoked, in addition to other reasons, the principle—or the fact—of contiguity and geographical unity. There is in this respect no difference between the proclamations of the United States of America, of many

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[1] The view here put forward is confirmed in an authoritative article by Mr. Young—who has made this subject particularly his own—in *American Journal of International Law*, 45 (1951), pp. 228 et seq.

[2] Attempts are occasionally made to distinguish between 'continuity' as referring to territory directly co-terminous and contiguity as referring to islands or other territory separated by water. There is probably no warrant for that distinction in accepted usage.

Latin-American states, and of the Rulers in the Persian Gulf acting under the international responsibility of Great Britain. The proclamation of the United States spoke of the continental shelf as 'an extension of the land mass of the coastal nation and thus naturally appurtenant to it'—a unity emphasized by the fact that 'these resources frequently form a seaward extension or a pool or deposit lying within the territory'. The Mexican Declaration of the same year was even more specific: 'As is well known, the lands which constitute continental masses do not as a rule rise steeply from the great ocean depths, but rest upon a submarine base called the continental platform. . . . This platform obviously constitutes an integral part of the continental countries.' The Argentine Declaration of 1946 began by reciting that 'the submarine platform, known also as the submarine plateau or continental shelf, is closely united to the mainland both in a morphological and in a geological sense'. The Peruvian Decree of 1947 opened with the statement that 'the continental submerged shelf forms one entire morphological and geological unit with the continent'. Similarly, the introductory passage of the Brazilian decree of 1950 asserted that 'the sea-bed which borders continents and islands and extends under the high seas is a veritable submerged territory and constitutes, with the land to which it is adjacent, one single geographical unit'.

In the passages quoted the basis of the title appears to be not contiguity in the accepted sense, i.e. as connoting horizontal prolongation of the already occupied territory, but a different, and apparently more intense, degree of unity—a unity provided by the fact that the shelf is supposed to constitute the base, the platform, on which the continent rests. It is possible to imagine that kind of unity also in relation to submarine areas—such as those in the Persian Gulf—which do not constitute a continental shelf in the technical meaning of the term. However that may be, it is probable that the difference between the two types of submarine areas is one of emphasis. On the one hand, the conception of the continent resting on the shelf visualized as a platform may partake to some degree of a figure of speech; on the other hand, the relation of the mainland to the submarine area where there is no continental shelf proper is different from that of mere horizontal prolongation as in the normal case of contiguity. Nevertheless, although there is probably more than a geographical nicety in the various hypotheses which gave substance to the words of the American and other proclamations that 'the continental shelf may be regarded as an extension of the land mass of the coastal nation',[1] it is more convenient, in the first instance, to view the true relation as one of contiguity.

The principle of contiguity as the basis of the title to submarine areas has encountered opposition on two grounds: The first is that the doctrine of contiguity, although occasionally enunciated, has never become part of international law and has been rejected by international tribunals. The second, already referred to,[1] is that contiguity represents a theory which, because of its vagueness and comprehensiveness, is full of dangerous implications and ought therefore to be discouraged. Neither of these two objections can be regarded as valid.

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[1] See above, p. 424.

To say that the principle of continuity—or contiguity—has no place in international law, is to state a proposition of doubtful accuracy. The principle of contiguity played a useful part in the period when some compromise between the fanciful assertions of pure discovery and effective occupation best fulfilled the needs of the time. This applies to the rule, which is no more than a variant of the principle of contiguity, that the occupation of the portion of the shore confers title to interior territory up to the limit of the watershed or that the occupation of the coast carries with it a right, in reasonable proportion to the extent of occupied area, to the entire territory drained by the rivers emptying their waters within its line. The latter rule Hall[2] described as unobjectionable although in an Opinion given in 1821 Lord Stowell doubted its accuracy except, possibly, in relation to islands.[3] Sir Travers Twiss was emphatic that 'there is no dispute amongst nations as to it'.[4] Some conception of contiguity underlay the early British Colonial Charters, such as that of Massachusetts Bay of 1628, which purported to operate 'from the Atlantick and Westerne Sea and Ocean on the east parte to the South Sea on the west parte'.[5] In connexion with the Oregon controversy the United States Secretary of State wrote in 1844: 'That continuity furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation, would seem unquestionable.'[6] He was echoing, in a different form, the frequently quoted words uttered in 1827 by Mr. Gallatin, the American Commissioner in the same controversy:

> 'It will not be denied that the extent of contiguous territory to which an actual settlement gives a prior right, must depend, to a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may, within a short time, be occupied, settled, and cultivated by such population, as compared with the probability of its being occupied and settled from another quarter.'[7]

This cautious statement was described by Westlake as still leaving the 'pseudo-scientific principle of contiguity in a position of near equivalence to the "manifest destiny" of rhetoricians'.[1] Sir Travers Twiss had previously enunciated the doctrine of contiguity as being 'but a disguised appeal to the principle of *vis major*' and as striking 'at the root of the fundamental axiom of international law, that all nations are upon a footing of perfect equality as to their obligations and rights'.[2] Yet in his treatise on the *Law of Nations* he formulated other principles of contiguity such as that of the watershed, of the middle distance, and of the rule that 'when a nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the independence and security of its settlement'.[3] In 1852, not many years after the Oregon controversy, in the dispute with Peru concerning the Lobos Island and with Haiti concerning the Navassa Island in 1873, the United States asserted the virtues of effective occupation over 'the facts of contiguity'.[4] But in the Note of Mr. Olney, the Secretary of State, to Sir Julian Pauncefote in connexion with the British Guiana controversy with Venezuela in 1896, there was once more a pointed reference to mere constructive occupation being 'kept within bounds by the doctrine of contiguity'.[5]

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[1] See below, p. 418.

[2] *International Law* (3rd ed., 1890), § 30, p. 109.

[3] The Opinion is reproduced in Smith, *Great Britain and the Law of Nations*, vol. ii (1935), p. 3. Thus Lord Palmerston seems to have suggested in 1834 that the proximity of the Lobos Island to Peru gave to the latter a prima-facie title to it (Moore, *International Arbitrations*, vol. iv, p. 3554; *British and Foreign State Papers*, vol. xxxi, p. 1097).

[4] *Law of Nations, Peace* (2nd ed., 1884), p. 209.

[5] See Moore, op. cit., vol. i, p. 265; Twiss, *The Oregon Question Examined* (1846), p. 311; Westlake, *Collected Papers*, p. 73.

[6] Moore, op. cit., p. 264.

[7] See Twiss, op. cit., p. 310.

In the arbitration between Great Britain and Portugal in 1870 concerning the Island of Bulama the arbitrator, in awarding the island to Portugal,[6] relied to a substantial extent on the fact of contiguity—a view not shared by an authoritative commentator in the *Recueil* of Lapradelle and Politis on the ground that 'contiguity in the case both of adjacent islands and of the watershed, cannot, like discovery, provide more than an inchoate title'.[7] When in the course of the arbitration in 1865 between Holland and Venezuela the latter relied on the doctrine of contiguity, she did so on the ground that that doctrine was 'well established in the relations of the United States and Great Britain'.[8] Some of the argument of Great Britain in the course of the British Guiana arbitration was couched in terms closely approaching the doctrine of contiguity. She urged that 'great weight must be given to the relative importance and presumable power of expansion in the direction of the vacant territory of the settlements, between which it is to be divided'.[9] Venezuela opposed that principle of division of territory although in the same arbitration she, too, put forward claims which were in effect closely akin to those of contiguity inasmuch as they were based on the natural and geographical features of the contested territories. In 1883 Great Britain put forward claims, based on contiguity, to what subsequently became German South-West Africa.[1] She subsequently abandoned that claim. It is not clear whether the reasons for that step were of a political or legal nature. Similarly, it is difficult to distinguish between the legal and political significance of the recognition of the relevance of geographical propinquity in relation to the *hinterland* doctrine in arrangements such as those of the Franco-British Agreement of 1904 concerning Morocco and French interests in Syria; the Anglo-Japanese Treaty of 1905 in so far as it concerned Korea; the Anglo-Russian Agreement of 1907 relating to spheres of influence in Persia;[2] and the Agreement of 1917 between the United States and Japan concerning China.[3] 23

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[1] *Collected Papers*, p. 173.

[2] Op. cit., p. 312.

[3] *Peace* (2nd ed., 1884), pp. 209, 216.

[4] Moore, op. cit., pp. 266, 267.

[5] Ibid., p. 269.

[6] *British and Foreign State Papers*, vol. lxi, p. 1102; Hertslet, vol. xiii, p. 963.

[7] *Recueil des arbitrages internationaux*, vol. ii (1923), p. 616.

[8] Ibid., p. 411.

[9] As quoted by Lindley, op. cit., p. 220.

Some aspects of the doctrine of contiguity also underlie the claims to Arctic and Antarctic regions put forward by a number of states—such as Great Britain, Canada, New Zealand, France, Russia, and Norway[4]—in so far as it is based on the so-called sector principle. By virtue of that principle areas have been claimed which are embraced by the projection northwards or southwards, as the case may be, of the areas bordering the respective maritime territories. While with regard to the Arctic these areas are, in a sense, contiguous to the territories of the states concerned, in the case of the Antarctic the contiguity is distinctly symbolic. In some cases an element of uncertainty is added to the situation by the fact that the territory claimed as the base of the sector is claimed by virtue of discovery. This applies, for instance, to Adélie Land claimed by France. While New Zealand has dissented from the suggestion that the Ross Dependency is claimed by virtue of discovery alone, the 'effective settlement' of it has taken place largely by 'display of State activity' in the wider sense such as issuing licences and appointment of magistrates.[5] Essentially, notwithstanding the controversial differences of the geographical features of the Arctic and Antarctic in relation to the mainland from which they project,[6] the claims to them are based—in so far as they are based on legal grounds—on some as yet undefined kind of contiguity, variously referred to also as proximity, region of attraction, and continuity. It is of interest to note that when the Russian claim to Arctic islands was first put forward in 1916 it referred to them as constituting 'an extension northward of the continental tableland [shelf] of Siberia'.

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[1] Lindley, op. cit., p. 230.

[2] Ibid., p. 331.

[3] As to which see Wright in *American Journal of International Law*, 12 (1918), pp. 519–22.

[4] That country originally opposed the 'sector' principle, but seems to have relied upon it since 1939. See Hackworth, op. cit., vol. ii, p. 460.

[5] See Hackworth, op. cit., pp. 456–8 for the correspondence on the subject.

[6] See Hyde, op. cit., vol. i, p. 350, and Waldock in this *Year Book*, 25 (1948), pp. 340 ff., where the variants of the doctrine of contiguity are discussed in detail in relation to claims to the Polar regions. See also Hyde in *Iowa Law Review*, 19 (1934), p. 293.

The award of Dr. Huber in the case of the *Island of Palmas* has occasionally been cited as proving the assertion that international law does not recognize the title of contiguity.[1] Even if that were the correct interpretation of the award it is doubtful whether, notwithstanding the high authority of the arbitrator, it could dispose of a doctrine which has figured prominently in the practice of states. However, it is doubtful whether this is the intended effect of the award. The arbitrator, it is true, held that 'it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial waters should belong to a state from the fact that its territory forms the *terra firma*'.[2] However, it must be borne in mind that the award related only to islands; that, in a sense, it was *obiter* inasmuch as the claim of the United States was not based mainly on contiguity;[3] that the arbitrator admitted that a group of islands may form 'in law a unit, and that the fate of the principal part may involve the rest'; and that he held in effect, with regard to occupation of territories which form a geographical unit, that the appropriation must be presumed, in the initial stages, to extend to the whole unit (a rule which is one of the main aspects of the doctrine of contiguity) and that the only consideration to which contiguity must cede is that of actual adverse display of sovereignty by the competing state.

The relevance—which is of special importance in relation to submarine areas—of the geographical unity of the main and contiguous territory is also illustrated by the arbitral award given in 1904 by the King of Italy in the controversy concerning the boundary between British Guiana and Brazil. He held that 'the effective possession of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*'.[4] Similarly, it is difficult to understand fully the judgment of the Permanent Court of International Justice in the case of the *Legal Status of Eastern Greenland* unless due weight is given to that part of the pronouncement of the Court which extended the legal consequences of display of sovereignty to uninhabited and uncolonized parts of Greenland forming an integral part of the territories which the Court considered to have been occupied by means of the display of some state activity.[5]

In fact, the apparent antinomy of effectiveness and contiguity begins to

[1] See Waldock, op. cit., p. 342.

[2] *Annual Digest*, 1927–8, Case No. 1.

[3] See Jessup in *American Journal of International Law*, 22 (1928), p. 743.

[4] *State Papers*, vol. xlix (1905), p. 930 (Cmd. 2166) (1904).

[5] To that extent, but only to that extent, Professor Ross's interpretation of the Judgment of the Court as having 'relinquished all demands of effectiveness' is believed accurately to express the legal position (*A Textbook of International Law* (English translation, 1947), p. 147).

wear thin as soon as we realize—and the award in the case of *Island of Palmas* and other cases clearly urge that consideration—that effectiveness need not be as complete as appears at first sight and that contiguity is not as theoretical and arbitrary as may appear at first sight. This explains why those who are sceptical of contiguity as a title occasionally suggest that a mere proclamation may satisfy the requirement of effectiveness—provided that it has the support of contiguity. The fact is that as a rule the conceptions of effectiveness and contiguity often provide no more than an argumentative starting-point. There is a sound core in both, though in case of conflicting claims mere contiguity when confronted with effective occupation, which is not *per se* illegal, must yield to the latter as representing a superior title. But effectiveness is not a magic formula which can be applied with mathematical precision. It is effectiveness relative to the situation and to the circumstances.[1] It may range from the requirement of intensive administration in every 'nook and corner' in a densely populated and developed area to mere 'state activity' manifesting itself in the conclusion of treaties and conferment of concessions by an authority situated in a narrowly circumscribed part of the territory or even outside it; and it may even assume the form of a mere proclamation. When that point is reached there is little to choose between contiguity and 'effectiveness' of occupation. Contiguity in such cases may be an essential condition which gives the only element of substance to such otherwise abstract occupation. In that sense contiguity is a factor more potent than effectiveness reduced to the very shadow of its natural self. Conversely, the claim of contiguity is *pro tanto* much stronger when there is only a remote prospect of occupation by rival states to oppose it—as is the case in the matter of submarine areas. While effectiveness in the shape of 'notional' occupation exhibits a somewhat formal and nebulous complexion, contiguity assumes, in comparison, a distinct degree of reality.[2] As already suggested the conceptions of effective occupation and contiguity, being relative, are but a starting-point. It is within the legitimate province of the judicial function—and of statesmanship—to use them with such discretion as the equities of the case and considerations of stability require.

The second objection against the principle of contiguity as the basis of the claim to submarine areas is partly of a political and partly of legal nature. It is that the conception of contiguity may be so vague in its comprehensiveness and elasticity as to lend itself to abuse in the form of exorbitant and eccentric claims, including those to remote territories effectively occupied by other states for prolonged periods, bordering on absurdity. As already intimated,[1] the answer to that objection is that no device can prevent the abuse of a rule or principle, however otherwise useful and reasonable, by unilateral claims of states which refuse to submit disputed issues to impartial adjudication. For, as has been shown, even more pertinent criticism can be levied in this respect against 'notional' occupation. Thus, although the apparent precision of the principle of effectiveness of occupation seems to make it preferable to the uncertain vagueness of contiguity, it lends itself to interpretations which deprive it of its natural meaning. The supposedly dangerous doctrine of contiguity becomes in effect the governing condition of 'occupation' while occupation is reduced to a declaration which is saved from being a purely nominal act only by dint of being supported by contiguity. In fact, both practice and principle suggest that, unless we fall back upon 'notional' occupation, contiguity, in particular such as that which occurs in relation to submarine areas, constitutes a proper basis of law and reasonableness[2] for the assumption of title over them. Contiguity may be, on occasion, a transparently eccentric figure of speech when made the basis of claims to distant territories. It may have served in the past retrogressive purposes under the guise of monopolistic claims to entire continents. This does not mean that in a case such as that of adjacent submarine areas it does not represent the only solution consonant with convenience, economic necessities, and requirements of international peace. There is therefore no inconsistency in the action of a state which rejects it in one sphere and adopts it in another.

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[1] See above, p. 416.

[2] It is of interest to note that when in 1885 Great Britain, Germany, and Spain concluded a treaty in which the two former Powers recognized, apparently in reliance upon propinquity, the Spanish sovereignty over the Sulu Archipelago including 'the places effectively occupied as well as those places not yet occupied', Holtzendorff, the German international lawyer, regarded this as a recognition of the principle of effective possession (*Handbuch des Völkerrechts*, 2 (1889), p. 266, n. 12).

While the doctrine—and the fact—of contiguity provide the natural foundation for the principle that the adjacent submarine areas belong to the littoral state, that principle may receive a substantial accession of strength from the view that the relation is one not only of contiguity and proximity but also of physical identity. That view underlies the conception, referred to above, of the submarine area in general and the continental shelf in particular, as being the platform, the base—as it were—on which the continent rests. This conception of unity, as distinguished from mere contiguity, underlies also the principal geographical explanations of the phenomenon of the continental shelf. One of these explanations is that the continental shelf originally formed part of the territorial domain of the littoral state from which it has been detached by maritime attrition.[3] Under that view the formal appropriation of the continental shelf is no more than a case of restitution *in integrum* in favour of the state asserting its pre-existing right over its own territory. The second theory explains the continental shelf by reference to the reverse process of accretion or accession, i.e. of the continental shelf having been formed by gradual sedimentation from the territory contiguous to the continental shelf. Accession and accretion are recognized modes of original acquisition of territory,[1] and some authors have attempted to base the appropriation of the continental shelf on that particular phenomenon.[2] Thirdly, it has been suggested that the continental shelf may be due to marine transgression over areas which were previously continental. This view, which does not differ substantially from the first explanation, is favoured in the most authoritative exposition of the subject.[3] It is most in accord with the wording of the proclamation of the United States in its reference to the continental shelf as 'an extension of the land-mass of the coastal nation'.

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[1] See above, p. 419.

[2] See p. 414.

[3] This, and the other geographical explanations of the continental shelf are analysed in the leading work on the subject by Bourcart (see above, p. 384). They are examined from the legal point of view in the Memorandum of the Secretary General of the United Nations on the *Régime of the High Seas* (A/CN. 4/32, pp. 66–70).

It is not intended here to express a preference for any of these hypothesis. In so far as any of them can be accepted, they add to the fact of contiguity without replacing it. It is in that fact of contiguity, in addition to other factors such as general acquiescence, that there must be sought the legal and rational explanation of the title, of which the proclamations and enactments of the littoral states are declaratory, to the adjacent submarine areas. That fact is given expression in most of the relevant instruments. It provides a legal basis of utility and reasonableness which is most consistent with the technical realities of the situation, with the security of states, and with the requirement of international stability.[4]

All these considerations explain why, independently of any legal doctrine, the appropriation—or, which is essentially the same, the right of appropriation—of the adjacent submarine areas have become part of international law by custom initiated by the leading maritime Powers and acquiesced in by the generality of states. The law creating—or law revealing—effect of that practice and of the absence of protest against it are emphasized by the circumstance that, as has been submitted, that practice is not only in conformity with a reasonably conceived notion of the freedom of the sea, but also that it adds vitality to it by demonstrating its capacity of adaptation to new problems and conditions. The practical demonstration of the possibility of reconciling the principle of the freedom of the seas with the justifiable claims inherent in the new developments connected with submarine areas can alone prevent their abuse by exorbitant pretensions violative of the freedom of the seas and wholly alien to the apparent occasion which has given rise to them. Such demonstration can also, on a wider plane, act as a reminder that, pending the establishment of an effective system of international legislation, unilateral action need not necessarily be disdainful of legality and reasonableness.

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[1] See Oppenheim, op. cit., § 229. For an emphatic approval of the 'accession' theory in the matter of the continental shelf before the International Law Commission see the observation of M. Yepes (A/CN. 4/SR. 67, pp. 66, 67).

[2] See, for example, Jonkheer Feith, op. cit., above, p. 400.

[3] See Bourcart, op. cit., pp. 142–6, 160.

[4] See above, p. 422.

It is within the legitimate province of the science of international law to draw attention to the general and specific implications, in the above sense, of the new doctrine, essentially rooted in established law, of the continental shelf and of adjacent submarine areas generally. Thus the circumstance that the sovereignty over these areas can be fully reconciled with the restrictions and obligations following from the principle of the freedom of the seas confirms the lesson—amply illustrated by practice but still in need of emphasis—of the elasticity, adaptability, and divisibility of territorial sovereignty. Similarly, international law may be of assistance in devising procedures for the solution of difficulties arising out of any conflict between the rules safeguarding freedom of navigation on the high sea and the actual operation of the new developments. Such assistance may also be required for the settlement of problems connected with the delimitation of the submarine areas either in general or as between competing states. For that purpose there may be a tendency to provide the adjudicating agencies with a body of law in the form of general rules. Any such tendency may be justified to a large extent. At the same time international law may have to steer in this matter a middle course between initiative and restraint. For while it may be important to guide and facilitate, through general rules, the progress of new development, it is probable that much of that guidance must be the cumulative result of arbitral decisions given on equitable grounds or of special agreements between the interested governments. A general international conference may not always constitute the best machinery. On some questions, such as the exact delimitation of the submarine areas outward to the sea, it may be preferable to await the actual proof of necessity of a concrete solution. Such necessity may never arise. Facts of geography may conclusively reveal lack of urgency in the imaginative zeal of lawyers. In other matters, such as the affirmation of the principle that artificial structures erected on the high seas for the purpose of exploiting submarine areas cannot be permitted to encroach on the freedom of the seas by any claim to territorial waters of their own, clear-cut international regulation may be called for at the very outset. Circumstances have brought about the affirmation by means of unilateral action of the principle of the right to adjacent submarine areas. That principle, it has been shown, is not contrary to any basic rule of international law. There still remains the task of ensuring that its application takes place in conformity with established law, reasonably interpreted, relating to the freedom of the sea and with the legitimate interests of the states concerned. The successful fulfilment of that task may in itself constitute a significant contribution to the enduring problem of peaceful change in international society.

NOTES

WAS THE LEAGUE OF NATIONS A CHARITY?

THE unreported case of *In re the Estate of Whitell, deceased, Crouch* v. *The League of Nations Union and Others*, decided on 20 July 1950, is of considerable interest to both Chancery and international lawyers. In that case Mr. Justice Danckwerts decided that the League of Nations was not a charity. He held that it was a juristic person and therefore a gift to it under the will of a testatrix who died in 1945 vested in it. As, however, the League had not actually received the gift before it was dissolved in 1946, the gift became *bona vacantia* and vested in the Crown. Had the League been a charity, the gift would have been applied *cy-près*, and possibly to the United Nations Organization. Although the League is no more, the question may still be topical, seeing that the considerations which moved an English court to pass upon the legal nature of the League of Nations would presumably be relevant in any case bearing upon the legal nature of the United Nations.

Miss Charlotte Sarah Whitell, by her last Will—a home-made affair—dated 8 April 1939, after giving certain specific and pecuniary legacies, bequeathed the residue of her estate to be divided between the League of Nations, the Protestant Truth Society, the British and Foreign Bible Society, and the Church Missionary Society. She died on 29 April 1945, and in October 1946 the plaintiff as administrator of her estate issued a summons[1] asking, *inter alia*,

> 'whether upon the true construction of the Will of the Testatrix and in the events which had happened the share of her residuary estate given by her said will to the League of Nations (a) ought to be paid to the League of Nations Union or (b) ought to be applied *cy-près* or (c) ought to be held on trust for [certain other persons] or (d) passed as under an intestacy of the Testatrix or (e) passed as bona vacantia'.

The case was opened by the plaintiff submitting briefly that the League of Nations was in existence at the death of the Testatrix, but that it had since ceased to exist. It had been to some extent replaced by the United Nations, which was not, however, the successor in title of the League of Nations, nor its successor with regard to any property within the United Kingdom. Evidence as to the dissolution of the League of Nations was supplied by Mr. Hugh McKinnon Wood, formerly Professor of International Law at London University and until 1940 a member of the Legal Section of the League. In 1946 he represented the United Kingdom on the Committee of the Preparatory Commission that drafted the Resolution of 12 February 1946, which was adopted by the General Assembly of the United Nations.[2] In an affidavit he related how in April 1946 at its last session the League was dissolved by Resolution of the Assembly[3] and thereby its assets became distributable in accordance with the 'Common Plan'.[4] He was satisfied that while the League was in existence, it was a juristic person composed of states in accordance with the rules and principles of international law and that it was capable of owning property and did own property in, *inter alia*, the United Kingdom. It was capable, in accordance with its financial Regulations, of receiving gifts, including bequests, from private persons.[1] He was further satisfied that if any moneys bequeathed to the League by the Testatrix had come into the hands of the Board of Liquidation before it passed out of existence, they would have been received as part of the liquid assets which (after adjusting the position of states Members of the League *inter se*) were distributable among such states by the Secretary-General of the League on behalf of the Board.[2] In accordance with the Resolution mentioned, the Board declared itself to be dissolved on 31 July 1947. Professor McKinnon Wood was accordingly of the opinion that the League being no longer in existence it was incapable of receiving any moneys due to it out of the estate of the Testatrix. Moreover, the states who were formerly Members of the League had no claim on and were not entitled to receive any part of the said moneys. He added that there was no legal successor to the League and in particular the United Nations Organization was in no sense a successor to the League entitled to receive such moneys.

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[1] The defendants were the League of Nations Union, the Protestant Truth Society, the Church Missionary Society, seven persons named as next-of-kin, and His Majesty's Attorney-General—the last named because charities were involved and also because if the gift failed it would become *bona vacantia*.

[2] See this *Year Book*, 23 (1946), p. 320.

[3] See Doc. A. 32 (1), 1946.

[4] See this *Year Book*, 23 (1946), p. 320.

In a further affidavit, Professor McKinnon Wood explained that gifts and bequests did not vest automatically in the League: under the League's Financial Regulations[3] they had to be 'accepted'. It was the practice of the League to regard testamentary bequests as well as other kinds of gifts as being included in the word 'gifts' for the purpose of the Regulations, but not to regard any gifts as vesting in the League until accepted by the Assembly or the Council. He was of the opinion that the bequest by the Testatrix to the League did not automatically vest in the League on the death of the Testatrix and could not have vested in the League unless and until it had been formally accepted by one or other body. He also thought that if the bequest was not accepted before the dissolution of the Board of Liquidators on 31 July 1947, it must be deemed to have lapsed. He went on to say that the League, being autonomous, was not answerable to the law or under the control of any individual state. He mentioned that the League formerly owned certain property in England, namely, the leases of two offices in London and certain funds for their administration. This property passed into the hands of the Board of Liquidators in accordance with the Resolution of 12 February 1946. And he added that the League was competent to be a party to legal proceedings in England—it had, for example, proved as creditor for a debt in English bankruptcy proceedings.

For the League of Nations Union, an affidavit by its honorary Treasurer showed forth its history and its incorporation by Royal Charter in 1925.[4] There was no other

[1] Documents Nos. C. 3. M. 3. 1931. X, Art. 23 (*a*); and *Official Journal* (1939), p. 700, item (*e*); and see *infra*, n. 3.

[2] It appears that these payments were made by the Secretary-General direct to the states concerned and not through the agency of the United Nations even in the cases of such states as were Members both of the League and of the United Nations. This is a departure from what is believed to have been the procedure originally contemplated, viz. that those states who were Members of the League and who became also Members of the United Nations were to receive their shares by credit entries in the books of the United Nations; other Member states were to receive their shares in cash.

[3] Art. 23 (*a*): '(1) Gifts which may directly or indirectly involve an immediate or ultimate financial liability for the members of the League may only be accepted after authorisation by the Assembly. (2) Gifts not involving any financial liability for Members of the League may be accepted by the Council or, where offered to an autonomous organisation by the competent authority of the organisation if the Council or the authority is satisfied that acceptance will not undesirably affect the general character of the League or the special organisation and is in accordance with the general policy which should be pursued.' In fact, these Regulations do not say that at least the second class of gifts would not vest in the League in the ordinary way. In any event, vesting for the purpose of this case would seem to be a question of English law, not of the Regulations of the League.

[4] According to the Royal Charter the objects were: '1. To secure the wholehearted acceptance

organization of a similar name in the United Kingdom. Counsel for the Union, after reading the affidavit, contended that either the mention of the League in the Will of 1939 was a misdescription for the Union, or, if not, the League having ceased to exist, the share of residue should be applied *cy-près* to the Union. He quoted from *Theobald on Wills*:

> 'If the [charitable] society or association existed at the testator's death, but ceases to exist before the legacy is paid, the fund has become devoted to charity, and will be applied *cy-près*.'[1]

To the objection that the League was merely a political body and so governed by *Re Strakosch*[2] he answered that in that case the gift was for certain purposes and to be applied in certain defined ways; here, the dominant purpose of the League had been peace—a general purpose. He admitted that there was some lack of authority even on the charitable nature of such a purpose, but referred to *In re Harwood.*[3] The League of Nations fell within Lord McNaghten's fourth class of charitable trusts:[4] 'trusts for other purposes beneficial to the community, not falling under any of the preceding heads'. If no charitable purpose was explicit in the words of the Charter, it was implicit from its context. Counsel contended that the preservation of peace must be an essentially charitable object, and the objects of the League comprised the preservation of peace throughout the world.

Counsel for the two other residuary beneficiaries defendants in the action contended that the gift vested in the League of Nations as from the death of the Testatrix; it had not been disclaimed; the League was not a charity and on its dissolution the bequest became *bona vacantia.* Counsel for the next-of-kin argued in favour of an intestacy as to the share of residue. He submitted that the gift was either to the League of Nations, a juristic person, or, if it was not some sort of corporation, to the Member states.

Counsel for the Attorney-General contended that unless the gift in question were held to be subject to a charitable trust, it vested in the Crown as *bona vacantia*; the donee having been dissolved before reducing it into possession. If, however, it were subject to a continuing charitable trust, then *Re Slevin*[5] would apply and the gift would fall to be administered by the Crown, who would apply it 'according to custom' for some analogous purpose of charity. He pointed out that the maintenance of the armed forces was within the intendment of the Preamble to the Statute of Elizabeth.[6] But,

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by the British people of the League of Nations as the guardian of international right. . . . 2. To foster mutual understanding . . . between the peoples of different countries. 3. To advocate the full development of the League of Nations so as to bring about such a world organisation as will guarantee the freedom of nations . . . maintain international order and finally liberate mankind from war and the effects of war.'

[1] Theobald, *The Law of Wills* (10th ed. by Morris, 1947), at p. 286.

[2] [1948] Ch. 37, [1949] 1 Ch. 529 (C.A.)—a fund to strengthen the bonds of unity between South Africa and the Mother Country and to appease racial feeling between sections of the South African community was held not charitable. Greene M.R., at p. 537, called it 'a political cause or aspiration'.

[3] [1936] Ch. 285—a bequest to the Peace Societies of Belfast and Dublin respectively; Farwell J. held that a bequest to a Society formed for the purpose of promoting peace was a good charitable gift. There was no evidence that there had ever been any societies which exactly answered the description in the Will, and the doctrine of *cy-près* applied.

[4] See *infra*, n. 6.

[5] [1891] 2 Ch. 236.

[6] 43 Eliz., c. 4, repealed by the Mortmain and Charitable Uses Act, 1888, except for the Preamble which is expressly preserved by s. 13 (2). The relevant words of the Statute are: 'The aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.' The Court will deem charitable the objects enumerated in the Preamble and all others 'which by analogies are deemed within its spirit and intendment' (*Morice* v. *Bishop of*

indeed, the existence of the armed forces of the Crown was a matter for the benefit of the public,[1] guaranteeing both protection from attack and the preservation of law and order. The forces of the League were strictly analogous. They were for preserving respect for the law in the component states and preventing unlawful aggression. They were analogous in the international sphere to armed forces of the nation in the national sphere. It was not carrying matters too widely to claim that the objects of the League were objects of a charitable nature as being for the benefit of the public of all nations. If then the gift was for the purposes of the League, it was proper to apply it *cy-près* to some charitable body of the same nature.

Giving judgment, his Lordship said that this was a case of difficulty and some novelty. After briefly stating the facts, he disposed of the claim of the League of Nations Union as being 'quite hopeless', and continued:

'Whatever the nature and constitution of the League of Nations, that body was in existence at the date of the death of the testatrix and that fact was known to her. The evidence shews that it was dissolved on 31 July, 1947. The legality of that dissolution is a very involved question, but I propose to deal with the case on the footing that the League was dissolved on that date. The questions to be considered are first, was there an effective gift to the League of Nations? and, secondly, whether the character of the objects of the League of Nations was of such a nature that it was a charitable body holding property on charitable trusts. If it was, then the property now in issue has to be disposed of on other charitable trusts by a *cy-près* application as laid down in *Re Slevin*.[2] If not, it will have to be decided what has happened to that property. And thirdly, what is to happen to this property in either event? Some evidence as to the nature of the League of Nations has been given by Mr. Hugh McKinnon Wood, an expert in international law and the working of the League of Nations: and he has given it as his opinion that ". . . it was a juristic person composed of states in accordance with the rules and principles of international law and that it was capable of owning property and did own property in the territory of Switzerland and in the United Kingdom and was capable, in accordance with its Financial Regulations, of receiving gifts, including bequests, from private persons". I have read the Covenant of the League of Nations; it was an international agreement between the parties thereto; it does not appear to me necessarily to follow that any juristic person was formed by it. The parties agreed to act on certain principles and rules for the benefit of mankind. But the opinion of Mr. McKinnon Wood is supported by other jurists, particularly Mr. Corbett.[3] I must accept those views and conclude that for the purpose of the acquisition of property the League of Nations was a juristic person and capable of holding property. I would have liked to know a great deal more about how the League acquired property. As to the Article 23*a*, (1) and (2), of the League's Financial Regulations set out in Professor McKinnon Wood's affidavit—did these rules prevent a legacy vesting in the League until it was accepted? I hold that they cannot prevail over the rules of English law. They are statements of policy, of the principles on which the Council of the League would act when a gift was made to them, but they do not exclude or prevent vesting; the rules of English law apply, and the gift vests until it is disclaimed. But these Regulations do not amount to a disclaimer.'

Durham (1804), 9 Ves. 399, at p. 405). In *Income Tax Special Commissioners* v. *Pemsel*, [1891] A.C. 531, Lord McNaghten (at p. 583) enumerated four principal divisions of charitable trusts, namely, for the relief of poverty, for the advancement of education, for the advancement of religion, and 'for other purposes beneficial to the community, not falling under any of the preceding heads'. See on the whole question Keeton, 'The Charity Muddle', in *Current Legal Problems*, 2 (1949), pp. 86–102, esp. pp. 89 and 95.

[1] Cf. *Re Driffill* (1949), W.N. 465, where a gift to be applied towards the defence of the United Kingdom from attack by hostile aircraft was held good.

[2] [1891] 2 Ch. at p. 241.

[3] See Corbett, 'What is the League of Nations?', in this *Year Book*, 5 (1924), pp. 118–48, at p. 144.

His lordship then recalled that when the League was dissolved its assets became distributable among the states Members of the League by the Board of Liquidators, which declared itself to be dissolved on 31 July 1947, and continued:

> 'Is this property, this legacy, subject to charitable trusts? if not, then it is *bona vacantia.* The objects of the League appear from the Covenant . . . [his Lordship read the Preamble to the Covenant]. They are said to be for the promotion of peace and the promotion of peace is for the benefit of all mankind. This again is said to be a charitable purpose. While I have considerable sympathy for that view I cannot give effect to it. I was referred to *Re Harwood*,[1] but in that case it was never argued that a fund for the promotion of peace was held on charitable trusts. It was assumed that the promotion of peace was a charitable purpose. *Re Harwood* therefore does not assist. This case is covered by *Re Strakosch.*[2] Not everything which is for the public benefit is a charitable trust. That proposition was discussed and decided in *Re Strakosch.* The real subject matter in this case was "a political cause or aspiration". That is to say, the constitution of the League of Nations was a political conception and its objects were political aspirations. I reluctantly therefore have to hold that it was not charitable. It follows that the quarter share of residue bequeathed to the League has no other owner and is *bona vacantia.*'

In view of the almost complete lack of authority and of the decision of the Court of Appeal in *Re Strakosch*,[3] Mr. Justice Danckwerts having decided that the objects of the League of Nations were no more than 'a political cause or aspiration', then the decision in *Re Whitell* was inevitable. It does, however, seem possible to argue that he was not bound to find as he did. In that event, he could well have gone on to find that the bequest to the League was a valid charitable gift. There are cases, not cited in *Re Whitell*, in which gifts to a country have been held charitable, and it might be thought that a gift to the League could be regarded as a gift to a group or body of countries. In *Nightingale* v. *Goulbourn*[4] a bequest to 'my country Great Britain' was held to be a valid charitable gift; and in *Re Smith*[5] there was a bequest to 'my country England' which the Attorney-General claimed was a valid gift being for the benefit of the community. It was held to be charitable for a definite purpose and a scheme was ordered under the Royal Sign Manual.[6]

It cannot be said that the League should not be regarded as a charity merely because on winding-up its assets were divided among its Members[7] or because its seat or scope of operations was out of the jurisdiction. The English courts will hold valid a bequest to a foreign charity if the latter's purposes are necessarily charitable and its objects are valid by both English law and the foreign law concerned,[8] and a gift to a foreign government for charitable purposes has been held a good and valid gift.[9]

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[1] [1936] Ch. 285.

[2] [1948] Ch. 37; [1949] 1 Ch. 529 (C.A.).

[3] [1948] Ch. 37; [1949] 1 Ch. 529 (C.A.).

[4] (1848), 2 Ph. 594.

[5] [1932] 1 Ch. 183.

[6] Cf. *Newland* v. *Attorney-General* (1809), 3 Mer. 684, a legacy for the reduction of the National Debt. But in *Re Tetley, Attorney-General* v. *National Provincial &c. Bank and Others*, [1926] A.C. 262, a gift for 'patriotic purposes', i.e. 'to benefit the cause of the country to which you belong' (*per* Lord Haldane at p. 267), was held not charitable.

[7] *Thompson* v. *Shakespear* (1860), 1 De G. F. & J. 399 and *Cane* v. *Long* (1860), 2 De G. F. & J. 75, are usually cited in support of such a proposition (see, e.g. *Tudor on Charities*, 5th ed. (1929), p. 18). At the same time, it must be borne in mind that had the bequest under the Will of Miss Whitell actually come into the hands of either the League itself or—more probably—the Board of Liquidators, the money would very soon have fallen into the general assets of the League and been distributed among a large number of states. English law would not, it might well be argued, favour such an immediate dispersal of moneys impressed with a trust.

[8] *Re Moore* (1919), 1 I.R. 316 (a gift to the Pope); *Keren Kejemeth Lejisroel* v. *Inland Revenue Commissioners*, [1932] A.C. 650 (the Jewish National Fund case).

[9] *Re Robinson, Besant* v. *The German Reich*, [1931] 2 Ch. 122 (a gift 'to the German Government for the time being for the benefit of its soldiers disabled in the last war').

The League having been dissolved and the bequest to it having vested in it but not having been reduced into possession (or 'accepted') by it, had the Court held it to be a charity and the *cy-près* doctrine applicable, one might ask whether that doctrine could be invoked in favour of a foreign charity (for example the United Nations). (For it is to be supposed that if the League had been held to be a charity in the eyes of English law, so would the United Nations Organization.) Authority is not lacking for an affirmative answer. In *Rodwell* v. *Attorney-General*[1] a fund collected for the erection and maintenance of an English church in Paris was directed to be devoted to the erection of a permanent church there in the place of a temporary structure. In *Simon* v. *Barber*[2] a gift to 'the Guernsey Hospital', which did not exist, was ordered to be divided equally between two hospitals in Guernsey.[3]

It remains only to speculate what might have happened had the United Nations Organization been invited to claim that it was entitled *cy-près* to a share of residue. Had it done so it would presumably have been made a party to the action and might have argued very cogently, in its own interests, in favour of the view that the League was a charity.

A. B. LYONS

THE LIMITS OF RUSSIAN TERRITORIAL WATERS IN THE BALTIC

THE absorption by the Soviet Union of Latvia, Estonia, Lithuania, and Koenigsberg, and her domination of Poland and Eastern Germany, have resulted in the re-emergence of Russia as a Baltic Power. Interference over several years by Russian authorities with Swedish vessels engaged in fishing off these Russian coasts has now culminated in a claim by Russia to exclude all vessels other than her own from fishing within a twelve-mile belt of waters. That claim was first asserted in a Russian Note, dated 26 May 1950, delivered to Sweden in reply to a Swedish Note of 4 May 1950. This Swedish Note, the ninth of a series of Swedish protests, was occasioned by the detention by the Russians of two Swedish fishing-vessels, which, according to the Swedish account, were fishing at distances of twenty-one and sixteen and a half miles from the Russian coast, and according to the Russians at distances slightly short of twelve miles from the coast. The Soviet Note claimed, on the strength of a Soviet Decree dated 1927, the right of exercising control over all vessels within a twelve-mile limit from the coast and of detaining the captains and crews of vessels guilty of breaking Soviet laws inside these waters, including the violation of fisheries reserved by Soviet law to Soviet citizens. The Swedish protests against the detention of the masters and crews of these vessels were therefore rejected. On 24 July 1950 a joint Note was presented to the Soviet Union by Sweden and Denmark. In this Note the two Governments asserted that neither of them had at any time recognized the right of any state bordering on the Baltic to claim a territorial belt of twelve miles; that the limits of European states in the Baltic had for centuries been fixed at three and, in certain cases, four nautical miles; and that the legal result of this was that the sea outside this limit was a part of international waters incapable of occupation by any one state. In a Note in reply, dated 31 August 1950, the Soviet Union denied that there exist any general rules of international law relating to the extent of territorial waters and asserted that the decision on this

[1] (1886), T.L.R. 712.

[2] (1829), 3 Ha. 195 n.

[3] See also *Attorney-General* v. *Mayor of London* (1886), T.L.R. 712; *Re Harwood* (*supra*), 1936] Ch. 285; and *In re Colonial Bishoprics Fund*, [1935] 1 Ch. 148.

question falls within the exclusive competence of each state; she further reiterated her reliance on the decree of 1927 and emphasized that no new extension of Russian territorial waters had taken place since then.[1]

At first sight the legal issue is a simple one. With some notable exceptions, contemporary legal opinion tends to regard the territorial belt as an integral part of the territory of a state, over which a state exercises full sovereignty. This, for example, was the view accepted by virtually all states at the Hague Conference for the Progressive Codification of International Law in 1930. According to the rapporteur of the Committee of this Conference at which the subject of territorial waters was discussed, 'it was recognized that international law attributes to each coastal state sovereignty over a belt of sea round its coasts. . . . The belt of territorial sea forms part of the territory of the state; the sovereignty which the state exercises over this belt does not differ in kind from the authority exercised over its land domain.'[2] According to the views of Sweden, for example, 'Swedish territorial waters are part of Swedish territory in exactly the same manner as the continental part of the country'.[3] A recently published Soviet official text-book of international law fully endorses the views of the Hague Conference, and classifies Russian territorial waters as a part of state territory.[4] If this view of territorial waters be the correct one, it follows that where one state succeeds to the territory of another state which comprises a maritime frontier, it succeeds at the same time to the territorial waters of such state, and this is indeed the view both of writers[5] and of at least one international tribunal.[6] When in 1920 Russia ceded the district of Petsamo to Finland, she ceded it 'with its territorial waters' and both were 'placed under the unrestricted sovereignty' of Finland.[7] But it is plain that the successor state cannot acquire from the state whose territory it absorbs more territory than that state possesses at the moment of absorption. Since none of the Baltic states to whose territory the Soviet Union has succeeded ever possessed or claimed a territorial belt of twelve miles, this is sufficient, on this view of the legal nature of territorial waters, to dispose in law of the present claim by the Soviet Union.

The Russian claim, however, raises anew the question of the juridical nature of territorial waters in practical form. Since Russia cannot rely on succession as a title to the twelve-mile belt, can she contend with any validity that sovereignty over territorial waters is based not on the incorporation of the territorial belt in state territory, but on a jurisdictional right exercised by the state which owns the coast?

In spite of the wide agreement at the Codification Conference in 1930, it seems open to doubt whether territorial waters can be fully identified in law with state territory. It is true that the complex of rights which a state enjoys in its territorial waters can only be described by the term 'sovereignty', and the close debates on this theoretical question both in the Institute of International Law in 1894 and at The Hague in 1929 and 1930 failed to arrive at any generally acceptable alternative term. Nevertheless both history and state practice suggest that the nature of this sovereignty differs in the cases of the land territory and the territorial waters of a state. On land a state is in full unrestricted occupation. The sea washing its coasts is incapable of such occupation: it can only be controlled from the coast, even though the nature of this control may be such as only to be described by the term sovereignty. Ortolan sums up the different nature of the two kinds of sovereignty as follows: 'En un mot, l'État a sur cet espace non la propriété, mais un droit d'empire; un pouvoir de législation, de surveillance et de juridiction, conformément aux règles de la juridiction internationale.'[1] The history of the development of the territorial belt supplies some confirmation of this view. For it is not an occupation or taking possession of a belt of coastal waters that lies at the origin of the present rules of law. The origin is rather to be sought in the first stages in the limitation accepted by states to their pretensions to sovereignty over wide areas of the open sea. The origin of this limitation, which has been conjecturally traced by the ingenious researches of Fulton to the fertile brain of Grotius, can be expressed in the principle advanced in 1610 by the Dutch to James I that 'no prince can challenge further into the sea than he can command with a cannon'.[2] Whatever its parentage, in the course of the eighteenth century the cannon-shot rule, under the influence of Bynkershoek's advocacy, won wide acceptance, outside Scandinavia, as the principle underlying the limits of neutral waters in naval warfare and of the rights of belligerents to seize ships as prize. By the end of the century the modern, fixed territorial belt had come into being, that is to say territorial waters were now delimited not in terms of actual control by cannon from the shore, but in fixed distances, often, though not universally, of three miles. Whether this took place by a translation of the range of artillery into one marine league of three nautical miles is doubtful, since there is evidence of the origin of the marine league as the limit of state sovereignty over its marginal sea quite independently of the cannon shot or its supposed maximum range.[3] But it seems reasonable to infer that it was not by any incorporation by states of the territorial belt as a part of their territories that the modern marginal sea originated, but rather as the result of successful assertion by the maritime states of various and separate aspects of their sovereignty—such as jurisdiction, exclusive fishery, neutrality, or customs control. This conclusion is suggested by the fact that from the start of the modern conception of territorial waters different limits for different aspects of sovereignty have existed side by side. For example, Britain, whose territorial sea was fixed at three miles at any rate by 1802, continued to exercise customs control up to twelve miles off her coasts and to claim exclusive pearl fisheries off the coast of Ceylon for an even greater distance. Nor did Britain claim criminal jurisdiction in her three-mile belt until 1878.[4] Again, Norway and Denmark (who had at no time adopted the cannon-shot rule for fixing the limits of their waters) adopted as early as 1745 the distance of one marine league, equivalent in Scandinavian measurement to four miles, for purposes of neutrality.[5] Yet they continued at least until 1812 to claim exclusive fisheries over a great part of their coastal waters to a much farther distance.[6]

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[1] The full texts of these Notes have not been published. I am indebted to the Royal Danish and Royal Swedish Embassies for their courtesy in letting me see the full summaries contained in the press releases issued by the Danish and Swedish Foreign Ministries.

[2] *League of Nations Doc.*, C. 351, M. 145, 1930, V, p. 123.

[3] *League of Nations Doc.*, C. 74, M. 39, 1929, V, p. 16.

[4] *Mezhdunarodnoe Pravo* (1947), p. 254.

[5] See Guggenheim, *Beiträge zur völkerrechtlichen Lehre vom Staatenwechsel* (1925), p. 61; Schönborn, *Staatensukzessionen* (1913), p. 31; and cf. Bynkershoek, *De Dominio Maris*, ch. 4.

[6] See the award of the arbitrators in the *Behring Sea Arbitration* in Moore's *Digest of International Arbitrations*, vol. i, p. 938.

[7] Treaty of Peace of 14 October 1920, *League of Nations Treaty Series*, vol. iii, p. 67.

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[1] *Règles internationales de diplomatie de la mer* (1856), Book II, ch. viii; see Fauchille, *Traité de droit international public* (8th ed. by Bonfils), vol. i, Part 2 (1925), p. 137.

[2] See Fulton, *The Sovereignty of the Sea* (1911), pp. 156–7 and footnote.

[3] See Raestad, *La Mer territoriale*, pp. 138–41; Walker in this *Year Book*, 22 (1945), p. 210.

[4] As Cockburn C.J. said in *R.* v. *Keyn*: 'To those who assert that, to the extent of three miles from the coast, the sea forms part of the realm of England, the question may well be put, when did it become so?'—(1876), 2 Ex. D. 63, at p. 194. Not by the Territorial Waters Jurisdiction Act, 1878, which merely defines territorial waters as 'such part of the sea adjacent to the coast of the United Kingdom . . . as is deemed by international law to be within the territorial sovereignty of Her Majesty' (s. 7).

[5] Crocker, *The Extent of the Marginal Sea* (1919), p. 608.

[6] See Fulton, op. cit., pp. 508, 653.

The modern practice of states does not entirely support the view that territorial waters are juridically equivalent to state territory. The incorporation of territorial waters in state territory by legislation is by no means the universal practice of states. Moreover it cannot be validly contended that the territorial belt could, e.g. by alienation, come under the sovereignty of one state, while the coastal land remains under the sovereignty of another.[1] The difference is also apparent in the laws of war. Thus occupation of the territorial waters of a belligerent can only exist where there is occupation of the coast, and is subject to the laws of land warfare.[2] The passage of troops of a belligerent over the land of a neutral is a violation of neutrality. The passage of a warship through neutral territorial waters, subject to certain limitations, is not, since 'the needs of maritime navigation prevail over the duties of neutrality.'[3]

If the view expressed above is the more correct one, it seems that sovereignty over the territorial belt should be viewed not as one whole and indivisible right, but as a complex of different assertions of control, not necessarily identical in limits. Seen in that light, sovereignty over the territorial belt can be regarded as an extension of sovereignty over land rather than as sovereignty over the sea. As such, an act asserting sovereignty over a territorial belt may in some circumstances be regarded as evidence of sovereignty over the mainland—a view adopted by the Permanent Court in 1933, when it treated Danish legislation which fixed the fishery limit along the whole Greenlandic coast at three miles as evidence of 'the exercise of sovereign authority' over the disputed parts of the mainland.[4] Nor will the extension necessarily be the same for different objects. A zone of customs control of twelve miles, for example, may on the one hand be more justifiable on the grounds of vital security and on the other less repugnant as an interference with vested rights, than an exclusive fisheries zone of similar extent. Or again, the growing range of modern artillery may justify in self-protection an extension of territorial waters for purposes of neutrality which would not be justified for, say, customs control.[5] In every instance the test must be such factors as the circumstances in which the particular claim has arisen, its justification, its acceptance by the states immediately affected, and above all its interference with established vested rights. For while it is true that there is no universally accepted limit of territorial waters, it is not in accordance with international law to contend, as Russia contended in her Note to Sweden of 31 August 1950, that the fixing of this limit is a matter of the exclusive competence of each state. On the contrary, although states have on occasion successfully asserted extended jurisdiction for limited purposes, such as customs control, there are no instances in modern times of the uncontested assertion by states of exclusive control in the matter of fisheries in defiance of a vested right in these fisheries by other states.[1]

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[1] Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht), p. 443, where the view adopted is that territorial waters as part of state territory must be regarded as 'inalienable appurtenances'. This view is incidentally supported by the Arbitral Award under the auspices of the Permanent Court of Arbitration in 1909 in the *Grisdabarna* case between Norway and Sweden. See Scott, *The Hague Court Reports*, p. 127: 'the maritime territory is an essential appurtenance of land territory, whence it follows that at the time when in 1658 the land territory called the Bohuslan was ceded to Sweden, the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this session.' The question has been raised in practice, though not resolved, in disputes between the Netherlands and Belgium, and the Netherlands and Germany, over navigation channels leading from the mouths of the Scheldt and Ems to the open sea, the mouths of these rivers being in each case in the territory of one state (Netherlands and Germany) and the channels running past the coasts and within the territorial belt of another state (Belgium and the Netherlands). The Netherlands have claimed sovereignty in the case of the Scheldt channel, but at the same time resisted the comparable claim by Germany in the case of the Ems channel. See *League of Nations Doc.*, C. 74, M. 39, 1929, V, p. 176.

[2] See Resolution of the Institute of International Law of 1913, *Annuaire*, 1913, p. 633 and pp. 328–32.

[3] See Professor Waldock's interesting argument on the *Sitka* incident in this *Year Book*, 24 (1947), p. 226.

[4] *P.C.I.J.*, Series A/B, No. 53, pp. 53–4.

[5] Professor La Pradelle, who is the main champion of the view that a state has no sovereign rights over its territorial waters, drew the conclusion in 1898 that different limits should apply for different objects—see his two articles in *Revue générale de droit international*, 5 (1898), pp. 264–84 and 309–57, at p. 339. See also Raestad, op. cit., p. 162, and ch. xii *passim*, who reaches the same conclusion though for different reasons. For a comprehensive discussion of the whole theoretical question see Gidel, *Le Droit international de la mer*, vol. ii (1934), pp. 153–

Adopting as an hypothesis this alternative view of sovereignty over territorial waters as a series of rights appurtenant to sovereignty over the mainland, it becomes necessary to consider the validity of the Russian claim to an exclusive fisheries zone of twelve miles on her Baltic coasts, in the light both of the history of Russian practice and of the legal régime of territorial waters which has, in the course of the development of that practice, become accepted by the other Baltic states.

Russia was a major Baltic Power from the beginning of the eighteenth century until the Bolshevik Revolution. Towards the end of the eighteenth century Russia had adopted cannon range as the measure for the limits of territorial waters for the purposes of neutrality, both in a number of treaties and in her regulations for privateers.[2] She did not, however, as yet adopt any fixed limit for other purposes, such as fisheries or customs. In 1821 an imperial ukase purported to declare a belt of a hundred Italian miles from the Russian Pacific coasts as territorial and to exclude all vessels from fishing within those limits. The ukase led to immediate protests by Britain and the United States and the claim was abandoned. In justification of it Russia adduced the grounds of security, arguing that arms were being furnished to the natives of Russian possessions in America (i.e. Alaska) and that they were being incited to revolt; and she even quoted the Treaty of Utrecht, which granted certain fishing rights to French subjects up to thirty leagues from the coasts of Nova Scotia. In abandoning her claim, however, Russia would not go further than an undertaking that she would abide by the 'general rule under the laws of nations' in the matter of territorial waters.[3] In practice, from 1853 onwards at any rate, Russia only asserted a claim within a three-mile belt in Pacific

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192. It is of interest to note that the Neapolitan Galiani, who is credited with having been the first writer to suggest the adoption of a fixed three-mile belt, irrespectively of whether a particular portion of the coast was in fact equipped with cannon, was of the opinion that while this distance was the outside limit for 'odious rights' such as customs control, it might be extended to six miles for 'beneficent' rights such as neutral asylum from belligerency. *Dei Doveri dei principi neutrali verso i principi guerreggianti* (1782), p. 422, footnote.

[1] The U.S. Proclamation on the Conservation of Fisheries is no exception, since it expressly recognized the rights of other states in cases where nationals of those states had by custom acquired a vested right in fisheries in U.S. Continental Shelf waters. For steps taken since 1945 to safeguard such vested rights by the United States see an article by Charles B. Selack, Jun., in *American Journal of International Law*, 44 (1950), p. 670.

[2] The regulations for privateers of 1787 are reprinted in Crocker, op. cit., p. 620. The treaties also all date from 1787: (*a*) with the Two Sicilies, of 6/17 January, Art. 19; (*b*) with France, of 31 December/11 January, Art. 28; (*c*) with Portugal of 9/20 December, Art. 24 (all in Martens, *Recueil de Traités*, vol. iv, pp. 237, 210, 328). It is probable that the Empress Catherine was deliberately following the practice of Britain in this policy. A rescript of 11/22 August 1769 to her Commander-in-Chief for the Mediterranean Theatre of Operations refers him to British and French instructions to privateers 'especially ordered from London' as a model for his own instructions. See *Sbornik Imperatorskogo Istoricheskogo Obshchestva*, vol. i, p. 23.

[3] *Behring Sea Arbitration; British Case. Command* 6918 of 1893, pp. 38–57.

waters.[1] In 1857, however, a zone of customs control of about four nautical miles (seven *versts*) was established along the coasts of her European land frontiers, including the Baltic, but the wording of this decree suggests that of the seven *versts*, only five, i.e. about three nautical miles, extended seawards, and the remaining two *versts* formed an inland strip for frontier control.[2] In 1867 a goverment commission, appointed to consider measures for the prevention of contraband at sea, recommended that 'a water area of three miles from the Russian coast should be recognized as territorial sea'. It based its view expressly on the cannon-shot rule. The Imperial Council, however, refused to commit itself to this general view, and preferred to enact in 1868 that such a three-mile belt 'is considered to be the maritime customs belt'.[3] In the following year, the Russian prize regulation also adopted the three-mile limit for purposes of neutrality.[4] Until the end of the century Russia adhered to the three-mile limit, which remained in force until 1909.[5] In 1874 Britain, through the medium of a circular letter issued by the Earl of Derby, endeavoured to bring about an international *démarche* of the maritime Powers in favour of the three-mile limit, directed against the Spanish claim to six miles. In her reply to Britain Russia agreed that the three-mile limit was supported by practice, but took the view that the legal question was unsettled.[6] In a communication to the Swedish and Norwegian Governments Russia stated that she had always recognized three miles as the breadth of the territorial sea, but at the same time declared orally that she would not dispute the four-mile limit claimed by these countries.[7] From the sixties onwards, frequent disputes arose between the Russian authorities and Norwegian fishermen over fishing in waters adjacent to the Russian northern coast. From the instructions and regulations collected by Captain Meyer it appears that the limit in fact enforced by the Russians was one marine league of four nautical miles. It is significant, however, that an instruction of 1893 claimed as a closed sea and as national waters the White Sea within a line drawn from Kanin Nos to Sviatoi Nos, a distance of eighty-nine miles.[8] Russia had thus not abandoned her pretensions to a greater belt of territorial waters than three miles, though it will be observed that she had hitherto preferred assertion of individual claims in respect of customs and neutrality to any general assertion of sovereignty—a policy pursued by the Soviet Government to this day. In 1898 another government commission on territorial waters was set up, under the chairmanship of Professor F. F. Martens. Martens now pressed the cannon-shot rule into service to argue that, as the range of cannon had increased, so with it had the extent of territorial waters. It was not a new argument. The previous year, as sole arbitrator in the *Costa Rica Packet* dispute, he had in his award asserted that 'the right of sovereignty of the state over territorial waters is determined by the range of cannon measured from low water reach'; a view of which Judge Moore later said in his dissenting Judgment in *The Lotus* case, 'if it meant the range of cannon in 1897, [it] was not in conformity with international law as then or now existing'.[9] Now, following Martens, the commission recommended that Russian territorial waters, in default of treaty or regulations 'established by long use', should be extended to six miles. A few years later a further commission recommended twenty miles. The Government, however, expressed itself, following its traditional policy, against any 'theoretical establishment once and for all' of the maritime belt, and in favour of laying down different limits for different parts of the Empire and for different interests in each case, such as customs or police.[1] In 1909 an Act of 10/23 December laid down a belt of twelve miles as 'the Marine customs area, within the limits of which every vessel, whether Russian or foreign, is subject to supervision'. This law extended to the entire coast of Russia, including the Baltic, in which hitherto the three-mile limit had been applied for all purposes. It led to immediate protests by Britain, the United States, and Japan, though not apparently by Germany or any other Baltic Power. In itself a zone of twelve miles for purposes of customs control alone is not inconsistent with state practice. The Russian Foreign Minister scored an easy diplomatic point by inquiring of the American Ambassador whether there was any record in the State Department archives of a protest by the United States against Britain's customs control of four marine leagues. But the protesting Powers were right in discerning in this Russian move the thin end of the wedge. Indeed, the Russian Foreign Minister told the American Ambassador that Russia proposed henceforward to maintain the twelve-mile limit as a permanent policy, and once again brought up as an argument the extension of the range of cannon since the eighteenth century. The Customs Act was soon followed by two further extensions of the territorial belt. An Act extending exclusive fisheries in the Pacific up to twelve miles was passed in 1911 despite the protests of the United States and Japan. A similar Bill relating to the White Sea was dropped as the result of British protests. Russia did, however, offer to include the whole question of territorial waters for discussion at the Third Hague Peace Conference, scheduled to meet in 1915.[2]

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[1] *Behring Sea Arbitration*, loc. cit., p. 115.

[2] *Svod Zakonov*, 1857 edition, vol. vi, para. 44.

[3] Meyer, *The Extent of Jurisdiction in Coastal Waters* (1937), pp. 236–7.

[4] *Behring Sea Arbitration*, loc. cit., p. 118.

[5] So far as Russian Pacific waters were concerned, as late as 1902 in two arbitrations between the United States and Russia arising out of the seizure of American vessels in the Pacific, Russia conceded that her territorial limits did not validly extend to twelve miles. See *Revue Générale de droit international public*, 10 (1903), Appendix of Documents, pp. 7 and 10 (the *James Hamilton Lewis* and the *C. A. White*).

[6] Smith, *Great Britain and the Law of Nations*, vol. ii (1935), p. 206.

[7] Meyer, op. cit., p. 235.

[8] Meyer, op. cit., pp. 241–55.

[9] *P.C.I.J.*, Series A, No. 10, p. 84. For Martens's views see also his article in *Revue générale*

The war and the revolution stripped Russia of most of her Baltic possessions. The three new Baltic states, until their absorption by Russia in 1940, all continued to apply the three-mile limit for all purposes except customs. For the purposes of customs Latvia and Estonia re-enacted the Russian customs law of 1909 creating the twelve-mile belt.[3] At the Hague Codification Conference Latvia expressed the view that a six-mile belt was 'very desirable', but does not appear to have taken any steps towards this end.[4] Finland claimed a general maritime belt of four miles and a customs zone of six.[5] There is nothing to suggest that the other Baltic states protested against the twelve-mile customs zone. In 1924, however, Germany protested against Finland's six-mile customs zone,[6] and at the Hague Conference in 1930 she disputed the right

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du droit international public, 1 (1894), pp. 32–43: 'Le Tribunal d'Arbitrage de Paris et la mer territoriale', at pp. 39–40). In support of Martens's view, however, may be instanced the fact that both Italy and Austria continued for some purposes to limit their territorial waters by cannon-shot range into the second half of the nineteenth century. See Meyer, op. cit., pp. 196–7 and 199–200.

[1] A full account of these deliberations based on official documents is in Meyer, op. cit., pp. 207–38.

[2] *Papers relating to the Foreign Relations of the United States*, 1912, pp. 1289 ff.

[3] See *League of Nations Doc.*, C. 74, M. 39, 1929, V, pp. 26, 29.

[4] For the position of Lithuania and Memel see Rautenkranz, *Die Völkerrechtliche Ordnung des Verkehrs in der Ostsee* (1934), pp. 15 and 17.

[5] Ibid., p. 27.

[6] According to Professor Schücking's Memorandum to the Hague Codification Conference. See *League of Nations Doc.*, V. 1, C. 196, M. 70, 1927, V, p. 33.

of any state to claim either a greater limit of territorial waters than three miles, or a contiguous zone for customs control purposes.[1] However, Germany, in common with Sweden, Denmark, and Norway,[2] was prepared to recognize the validity of a customs zone of greater breadth than the territorial zone on the basis of treaty, and the report of the deliberations of the Conference concludes that 'most states agree, to a greater or lesser extent, that exercise of particular specified rights by the coastal state outside its territorial waters . . . can be recognized as legitimate, at any rate as a compromise and as the result of a convention on the subject'. But no such agreement was envisaged so far as an extended fisheries zone was concerned.[3] Moreover in 1925 Germany, Denmark, Estonia, Finland, Latvia, Lithuania, Norway, Poland, the Free City of Danzig, Sweden, and the U.S.S.R. had signed a convention in which they undertook, 'without prejudice to the attitude' of each regarding the legal principles governing the contiguous customs zone, to raise no objection to the application by each country of its laws directed against 'vessels which are obviously engaged in contraband traffic' within a twelve-mile zone.[4] Thus the position which had been established before the re-emergence of Russia on the Baltic may be summed up as unrestricted rights over the waters of the Baltic up to a limit of three, in some parts (Sweden and Finland) four, nautical miles; and toleration, if not recognition, of a zone of up to twelve miles off the former Russian coast for customs purposes only. In particular, so far as fisheries are concerned, an unrestricted right had been enjoyed off this coast up to the three-mile limit for over a century.

Soviet Russia lost little time in pressing on with the policy regarding territorial waters which had been initiated by the Imperial Government in 1909. Moreover, like the Imperial Government, she continued to assert her claims for separate areas, and for separate purposes, in preference to asserting any one uniform claim to a territorial belt subject to her sovereignty.[5] In 1921 Russia passed into law her claim to exclusive fisheries within a twelve-mile belt off her White Sea coasts and within the line drawn from Sviatoi Nos to Kanin Nos, in a measure substantially identical with the one which had been withdrawn in 1911 as the result of British objection.[6] This claim, and the subsequent attempts to enforce it, drew protests from the states most affected, Britain and Norway, and from Germany. In the case of Britain, the Temporary Fisheries Agreement of 22 May 1930 eventually put an end to a long-drawn dispute by conceding to Britain the right of fishery within the belt of sea between three and twelve miles distant from the Russian coast, but without prejudice to the views of either Government on the limits of territorial waters.[7] Agreement with Norway and Germany was reached in 1923 and 1925. The Russians exacted from Germany, but not from Norway, an acknowledgment that Germany renounced her claim in international law to fish up to three miles off the Russian coast.[1] But since this renunciation was limited to the duration of the licence granted by Russia (to fish between three and twelve miles off her coasts) it is doubtful if much legal importance can be attached to it as evidence of a general admission by Germany of Russia's claim in law. The complicated story of the Soviet claims to twelve miles' exclusive fishery in Pacific waters and the long-drawn-out dispute with Japan is not relevant in this context.[2] In the case of Finland the treaty of peace of 14 October 1920 delimited with precision the exact boundary-line in the Gulf of Finland between the two countries.[3] Twenty years later the Soviet waters defined by this treaty were by decree incorporated in Soviet territory—the only instance of any legislative incorporation of territorial waters in Soviet practice.[4] In 1927 the Soviet Union passed the first comprehensive decree on territorial waters, which is the decree relied on in her Notes to Sweden. This established 'with the object of protecting the security of state frontiers' a zone of twelve miles from low-water mark 'with the exception of cases provided for by international agreement'. Within this zone all vessels are decreed subject to stringent control against contraband, attempts to smuggle persons in or out of Russia, as well as illegal fishing.[5] Merchant vessels can be detained for inquiries and the ships' documents impounded. Other decrees relating to the surveillance of ships within the twelve miles zone dating from 1924, 1926, and 1927 deal with regulation of signalling, prevention of damage to submarine cables, pilotage, icebreakers, and the holding of inquiries in cases of damage caused by collision.[6] There is no evidence of the notification of the decree of 1927 to other Powers. In 1935 a further decree was passed. This declared the zone within the twelve-mile belt off the Soviet coasts laid down in the decree of 1927 to form part of national fishing waterways in which all fishing by foreign nationals is prohibited, and by which extensive powers are conferred on the municipal authorities for the protection of fisheries.[7] Again, no notification took place to other Powers. It is plain that neither of these decrees could have had any reference to Baltic waters, which did not at the dates when they were passed wash any part of the Russian coast (apart from the Gulf of Finland, which continued to be governed by the treaty of 1921). Moreover, so far as the main international fisheries off the Russian coast were concerned, in the Pacific and the White Sea, these decrees did not add anything to the claims already made by Russia, claims which had been disputed by the interested states and which had, with the possible exception of Germany, not been conceded in the conventional arrangements eventually arrived at.

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[1] *League of Nations Doc.*, C. 74, M. 39, 1929, V, pp. 23–4. The German territorial limit is three miles for all purposes.

[2] Ibid., pp. 25–6, 30, 32–3. Norway herself claims a customs zone of ten nautical miles.

[3] Ibid., p. 34.

[4] Convention of 19 August 1925 for the Suppression of the Contraband Traffic in Alcoholic Liquors, Art. 19, *League of Nations Treaty Series*, vol. xlii, pp. 79–81.

[5] It is true that a decree of 5 July 1924 assures free passage both to merchant ships and to warships in time of peace within the range of coastal batteries. But if this assertion is to be interpreted as a claim to a uniform territorial belt measured by the range of shore artillery, it does not in fact represent Soviet practice before or since. See *League of Nations Doc.*, 1929, V. 13, C. 74 (*b*), M. 39 (*b*), 1929, V, p. 2 (a letter from the U.S.S.R. to the Preparatory Committee of the Hague Codification Conference).

[6] For a translation of the text of the Decree of 24 May 1921 see *U.N. Doc.*, A/ N. 4/38 p. 8.

[7] *Treaty Series*, No. 22 of 1930, Arts. 1 and 2. For the British protests and the diplomatic exchanges on the subject with Russia see *Command Papers*, 1869, 1874, and 1890 of 1923.

Thus the claim by Soviet Russia to a belt of twelve miles' exclusive fishing off her newly reacquired Baltic coasts does not appear to rest on any valid legal foundation. If territorial waters are to be regarded in law as a part of the territory of the state, then Russia cannot claim to succeed to more territory than was under the dominion of

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[1] See Böhmert, 'Die russische Fischereigrenze', in *Zeitschrift für Völkerrecht*, vol. xxi, at pp. 491–5.

[2] For a very full treatment see Böhmert, ibid., vol. xxii, pp. 257–306.

[3] *League of Nations Treaty Series*, vol. iii, pp. 66–7, Art. 3.

[4] Art. 1 of the Decree of 3 August 1930 (para. 450 of No. 44 in the Official Collection of Decrees). This is probably to be explained by the pretensions of Soviet Russia to treat as *national* waters (and closed) bays with entrances of considerable dimensions. The case of the White Sea has been noted. Recently a claim has been advanced that the Gulf of Riga, of which the entrance is some twenty-eight miles wide, is to be regarded as such national waters. See *Mezhdunarodnoe Pravo*, p. 248. On the Finnish and Riga Gulfs see Rautenkranz, op. cit., p. 24.

[5] Para. 625 of No. 62 of the Official Decrees for 1927, Arts. 23–34.

[6] A summary of these provisions is contained in *League of Nations Doc.* C. 74 (*b*), M. 39 (*b*), 1929, V, p. 3.

[7] Para. 420 of No. 50 of the Official Decrees of 1935, Arts. 2 and 12.

Latvia, Estonia, and Lithuania. If sovereignty over the territorial belt is more properly to be regarded as an extension of the sovereignty which is exercised over the coastal lands, or as a right appurtenant to the sovereignty over the coastal mainland, then such extension cannot lawfully take place in defiance of the vested rights of other states, established for over a century. Indeed, the Soviet Union has itself in the past admitted so much when it proposed at The Hague in 1930 the adoption of a resolution to the effect that in asserting claims over waters contiguous to the coast 'the use of international maritime waterways must under no conditions be interfered with.'[1]

L. B. SCHAPIRO

THE UNITED NATIONS *LAISSEZ-PASSER*

I. *Introductory*

THE idea of an international *laissez-passer* is not a creation of the United Nations. Already during the period of the League of Nations the notion had been conceived that international civil servants should possess a valid travel document additional to their own national passports. However, a League passport was never issued, although the question was discussed at length. Instead, the Secretary-General of the League supplied officials going on missions with a document certifying their status, which was known as a *lettre de mission*.[2] That practice of the League of Nations was therefore borne in mind by the Preparatory Commission of the United Nations when the matter of an international passport for United Nations officials was discussed. The following statement is to be found in its report:

> '*Creation of an International Passport*
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> '6. In order to facilitate the travelling of officials it may be found desirable to institute an international passport issued by the Organization, describing the holder as its official. The United Nations might issue such passports also to the senior officials of specialized agencies. The creation of this passport would not, of course, impair the sovereign rights of members of the United Nations in respect of the granting of visas. It might, however, be hoped that any necessary visas would be granted speedily. Member governments are already required to grant visas speedily under the constitutions of some specialized agencies. It may be desirable to confine the holding of these special passports to superior officials.'[3]

The Preparatory Commission was concerned with the first draft of the Convention on the Privileges and Immunities of the United Nations, and it may thus be pertinent to refer to its Article 7, paragraph 1, which provided for the issue of the so-called 'United Nations passport', and read as follows:

> '1. The Organization may issue United Nations passports to its officials.[4] All United Nations passports shall be recognized and accepted as passports.'

During the discussion of the Draft Convention by a Sub-Committee of the Sixth Committee of the first part of the first session of the General Assembly, and then by the Sixth Committee itself, the term *laissez-passer* was introduced. The Convention itself was adopted by Resolution 22 (I) of the General Assembly, on 13 February 1946, Article VII whereof reads as follows:

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[1] *League of Nations Doc.* C. 351, M. 145, 1930, V, pp. 134–7.

[2] See for an informative study on this subject *Immunities and Privileges of International Officials*, by Martin Hill, chap. vii.

[3] *Report of the Preparatory Commission of the United Nations*, PC/20, 23 December 1945, p. 62.

[4] Ibid., p. 74.

'SECTION 24. The United Nations may issue United Nations laissez-passer to its officials. These laissez-passer shall be recognized and accepted as valid travel documents by the authorities of Members, taking into account the provisions of Section 25.

'SECTION 25. Applications for visas (where required) from the holders of United Nations laissez-passer, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition such persons shall be granted facilities for speedy travel.

'SECTION 26. Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations laissez-passer, have a certificate that they are travelling on the business of the United Nations.

'SECTION 27. The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations laissez-passer on the business of the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

'SECTION 28. The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.'[1]

II. *Acceptance and recognition of the* laissez-passer *by Member states*

Thirty-eight states Members of the United Nations, as of 1 November 1950, have acceded to the Convention and bound themselves to accept and recognize as a valid travel document the United Nations *laissez-passer*.[2] With regard to those Member states which have not acceded to the Convention it may be noted that the General Assembly, by Resolution 93 (I), of 11 December 1946, recommended:

> 'that Members, pending their accession to the Convention, should follow, so far as possible, the provisions of the Convention in their relations with the United Nations, its officials, the representatives of its Members and experts on missions for the Organization'.

The great majority of those states which have not acceded to the Convention accept and recognize, as a matter of practice, the *laissez-passer* as a valid travel document. The state wherein the headquarters of the United Nations is located, namely, the United States, however, has not yet acceded to the Convention and has not felt itself able to accept or recognize in practice the United Nations *laissez-passer* as a valid travel document. Considering the great amount of travelling which necessarily takes place to and from the headquarters, it is natural that the delay in action by the host government has tended to diminish meanwhile the practical value of the *laissez-passer*.[3]

However, all officials of the United Nations who are not United States citizens are granted by the provisions of Section 3 of United States Public Law 291, 79th Congress, exemption from customs duties and internal revenue taxes which otherwise might be imposed by reason of the importation of their baggage and effects. Additionally, all such officials are assured the right of entry into the headquarters district by reason of the provisions of Section 11 (1) of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations (United States Public Law 357, 80th Congress).

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[1] These provisions, and those of Art. V, which set out the other privileges and immunities to which United Nations officials are entitled, are reproduced in the five official languages of the United Nations, in pp. 29–38 inclusive of the *laissez-passer*.

[2] The list in chronological order of accessions to the Convention is as follows: United Kingdom, Dominican Republic, Liberia, Iran, Honduras, Panama, Guatemala, El Salvador, Ethiopia, Haiti, France, Norway, Sweden, Afghanistan, Philippines, Nicaragua, New Zealand, Greece, Poland, Canada, Iceland, Netherlands, India, Denmark, Egypt, Pakistan, Belgium, Chile, Luxembourg, Australia, Lebanon, Iraq, Israel, Costa Rica, Brazil, Bolivia, Yugoslavia, Turkey.

[3] See *Official Records of the Fourth Session of the General Assembly, Sixth Committee*, pp. 472 ff.

By contrast, Switzerlamd, which is the host state of the European Office of the United Nations, has recognized and accepted the *laissez-passer* as a valid travel document. An Interim Arrangement on the privileges and immunities of the United Nations was concluded between the Secretary-General of the United Nations and the Swiss Federal Council, signed at Berne on 11 June 1946, and at New York on 1 July 1946, and was approved by the General Assembly on 14 December 1946.[1] Article VII of this Interim Arrangement contains *mutatis mutandis* the same provisions in respect of the United Nations *laissez-passer* as Article VII of the Convention on the Privileges and Immunities of the United Nations. It may be remarked that the acceptance and recognition of the *laissez-passer* by Switzerland has been of great value, having regard to the numerous conferences and commissions which hold their sessions and meetings at Geneva.

III. *Persons entitled to the use of the United Nations* laissez-passer

The term 'officials' as used in Article 7 of the Draft Convention drawn up by the Preparatory Commission was defined in a footnote to Article 6 thereof as follows:

> 'By this word it is intended to cover all ranks of the Secretariat and all those who have to make the declaration of loyalty to the Organization, but not to include local employees, such as office cleaners, motor car drivers, etc.'

This definition formed the basis of the subsequent resolution which was adopted by the General Assembly on 7 December 1946 with reference to the categories of officials to which the provisions of Articles V and VII of the Convention should apply. This Resolution 76 (I) reads as follows:

> 'The General Assembly,
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> 'Having considered the proposal of the Secretary-General that, in accordance with Section 17 of Article V of the Convention on the Privileges and Immunities of the United Nations, the categories of officials to which the provisions of Articles V and VII shall apply should include all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates;
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> 'Approves the granting of the privileges and immunities referred to in Articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates.'

It would appear from the terms of this Resolution[2] that all 'members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates', became thereby entitled to a *laissez-passer*. Subsequently, however, the General Assembly adopted, on 18 November 1948, by Resolution 239 (III), a Staff Assessment Plan. This Resolution provides, *inter alia*, that all salaries, wages, &c., 'to whomsoever paid by the United Nations shall be subject to an assessment'. In conformity with these terms the practice of the Administration became to subject practically all personnel engaged under contracts by the United Nations, for whatever kind of duty, to the provisions of the Staff Assessment Plan. Being thus subjected they became automatically by virtue of its provisions 'United Nations staff members', and being staff members they have become *ipso facto* United Nations officials by virtue of Resolution 76 (I). At the same time, to conform to the otherwise conflicting provisions, locally recruited personnel were no longer assigned to hourly rates. Thus, many persons whose duties connected with the United Nations were of a trivial, intermittent, or temporary character, being subjected to the Staff Assessment Plan, became 'United Nations officials' and thereby entitled to a *laissez-passer* (and to all the other benefits of Articles V and VII of the Convention). This illogical consequence of Resolution 239 (III) of the General Assembly may be considered as going beyond its intention at the time of the adoption of Resolution 76 (I).

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[1] *United Nations Treaty Series*, vol. i, No. 8, p. 163.

[2] It may be noted that the report of the Joint Sub-Committee of the Sixth and Fifth Committees which was considering the proposals of the Secretary-General on the categories of officials, contained the following statement: 'The Sub-Committee considered the possibility of basing the determination of categories of officials to whom the privileges and immunities shall be extended upon the functions to be performed by the officials included in each category. It was agreed that this approach was impracticable. It was, however, stressed that as the privileges and immunities are not granted in the interest of the individuals concerned, they should avail themselves of these privileges and immunities in a restrictive manner.' See *Official Records of the Second Part of the First Session of the General Assembly, Sixth Committee*, Annex 11*d*, p. 225.

In this respect, attention may be drawn to Article 105 of the Charter, which sets out that 'officials of the Organization shall enjoy such privileges and immunities as are *necessary*[1] for the independent exercise of their functions in connection with the Organization'. It would seem to require a vast stretch of imagination to conceive that many of the privileges and immunities of officials enumerated in Articles V and VII of the Convention are *necessary* for certain types of work which manual workers and other lower-grade personnel perform. But clearly the use of the *laissez-passer* by such officials must be regarded as one of their *necessary* privileges, and furthermore it must be acknowledged that in certain circumstances due to the nature of the country of service, or to the existence of unusual dangers or hazards, low-grade officials may well stand in even greater need of the *laissez-passer* than higher-grade officials.

However, only internationally recruited staff members are subjected to the Staff Assessment Plan and locally recruited personnel at the various United Nations centres are thus not designated as 'officials' and not entitled to a *laissez-passer*. That practice has the distinct advantage of not reducing the actual value of the *laissez-passer* by creating too many holders, and is quite reasonable since such personnel are not required to travel or serve outside their home country.

IV. *Issue and description of the* laissez-passer

The first step taken by the Secretariat towards the issue of the *laissez-passer* was a circular letter to all Member states of the United Nations, on 23 April 1947, in which the Secretary-General, referring to Article VII of the Convention, stated that pending the issue of *laissez-passer* it was essential in the interest of the work of the Organization that United Nations officials should have the benefit of special facilities when travelling on missions in the territory of Member governments. The *laissez-passer* were first issued from the United Nations Headquarters at Lake Success. However, it was soon appreciated that this procedure was rather cumbersome for United Nations officials serving at the Geneva Office. This practice was therefore discontinued and *laissez-passer* came to be issued away from Headquarters, which, however, continued to maintain a check upon such issue. The validity of the *laissez-passer* is for a prescribed period of usually two years, and after that period it may be revalidated. A careful procedure has been instituted for the cancellation of *laissez-passer* whenever a holder thereof leaves the Organization.

On the cover of the *laissez-passer* the emblem of the United Nations appears in gilt, with the words 'United Nations—Nations Unies' and 'Laissez-passer' above and below the emblem respectively. The text of the *laissez-passer* is surface printed throughout (apart from the actual cover) in the five official languages of the United Nations. The personal particulars of the bearer do not include the nationality. This omission of the nationality of United Nations officials has presumably been based on the policy of maintaining the international character of the document, and it has also served to prevent states from holding up any particular official on account of his nationality. On the other hand, it is not inconceivable that there would be some advantage in indicating the nationality, since in many cases it might well accelerate the visa, customs, and other travel formalities.

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[1] Italics added.

Page 3 contains the following general statement and request:

> 'To all who shall see these presents, Greetings:
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> 'You are requested to extend to the bearer the courtesies, facilities, privileges and immunities which pertain to his (or her) office, and to facilitate by all suitable means the journey and mission on which he (or she) is engaged.'

This is followed, on page 4, by a certification signed by the Secretary-General that the holder is an official of the United Nations, and on page 5 by a statement that the *laissez-passer* is issued under the authority of Article VII of the Convention.

Pages 7 to 28 inclusive provide space for the insertion of visas, and, in this respect, reference may be made to the provisions of Section 25 of the Convention.[1] In practice, applications for visas for United Nations officials have not been accompanied by the certificate mentioned in this section, except where states have specifically requested such certificates, because owing to administrative difficulties it has not been found practicable to supply each official with such a certificate, bearing in mind the considerable clerical work which would be involved.[2] It is noteworthy, however, that all Member and non-Member states accepting and recognizing the *laissez-passer* have granted free visas to all holders thereof. The Governments of the United Kingdom on 1 July 1948, and of Pakistan on 27 April 1950, informed the Secretary-General that they had decided to dispense with visa requirements for holders of the United Nations *laissez-passer* travelling on official business. This action has considerably facilitated the travelling of the United Nations officials to these countries, and may be said to be in the best interests of the United Nations, particularly since the mere fact of the requirement of visas for holders of *laissez-passer* has tended to diminish the value of the document itself, one of whose essential purposes is that the holders thereof should be granted facilities for speedy travel. Moreover it will be seen from the provisions of Section 25 that the requirement of visas for holders of *laissez-passer* when travelling on official business of the United Nations is not an absolute one, and that in fact these provisions implicitly recognize that these requirements may be dispensed with by Member states. It may be assumed that other Member states would also desire to dispense with visa requirements if the information which becomes available to the various immigration and consular authorities of Member states by reason of the visa procedures could also readily be made available directly to them by general or special notifications. This would offer the advantage of not delaying holders of United Nations *laisser-passer* travelling on official business, and at the same time of providing the governments of Member states with all the necessary information which they would have had to obtain otherwise.

A further point connected with visas may also be noticed. When, for instance, a state has granted a visa on a *laissez-passer*, the national passport of the holder thereof will not be required, and the official concerned will benefit from speedier facilities and other privileges which he would otherwise not have obtained merely by using his passport. On the other hand, in the circumstances where a state has dispensed with visa requirements, by bilateral agreement, for nationals of certain other states, officials of the nationalities concerned will only benefit when travelling or using their national passports and not their *laissez-passer*. This is indeed a case where the fortunate possessor of two valid travel documents can use his own discretion to secure preferential treatment.

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[1] See p. 449, *ante*.

[2] This should be distinguished from the issue of United Nations Certificates under s. 26 of the Convention to persons who are not officials of the United Nations. See p. 454, *post*.

V. *Application of the* laissez-passer *to specialized agencies*

Article VII, Section 28, of the Convention provides that 'the provisions of this Article may be applied to the comparable officials of the Specialized Agencies if the Agreements for relationship made under Article 63 of the Charter so provide'. The Agreements between the United Nations and the International Bank for Reconstruction and Development, the International Monetary Fund, the International Refugee Organization, the International Telecommunications Union, and the World Health Organization, respectively, contain clauses entitling their officials to the use of the United Nations *laissez-passer*. In addition, supplementary Agreements have been concluded between the United Nations and the International Civil Aviation Organization, the United Nations Educational, Scientific, and Cultural Organization, the Food and Agriculture Organization, and the Universal Postal Union, by which an additional clause has been added to the original Agreements between the United Nations and these Specialized Agencies, to the effect that their officials shall have the right to the use of the United Nations *laissez-passer*. By virtue of these Agreements, Arrangements have been entered into between the United Nations and the various Specialized Agencies concerned for the issue of the *laissez-passer* to the officials of these Agencies. These Arrangements have been governed by standard terms and *laissez-passer* have been issued to officials of the Specialized Agencies on an identical basis.

Sections 26 and 27 of Article VII of the Convention on the Privileges and Immunities of the Specialized Agencies read as follows:

'*Section 26*

'Officials of the Specialized Agencies shall be entitled to use the United Nations laissez-passer in conformity with administrative arrangements to be concluded between the Secretary-General of the United Nations and the competent authorities of the Specialized Agencies to which Agencies special powers to issue laissez-passer may be delegated. The Secretary-General of the United Nations shall notify each State party to this Convention of each administrative arrangement so concluded.

'*Section 27*

'States parties to this Convention shall recognize and accept the United Nations laissez-passer issued to officials of the Specialized Agencies as valid travel documents.'

So far only one Administrative Arrangement, pursuant to Section 26, has been concluded, and this between the United Nations and the International Labour Organization, thus entitling the latter itself to issue *laissez-passer*. These *laissez-passer* also bear the words 'International Labour Organization—Organization internationale du Travail' on the cover design. Up to 1950 only the Governments of Austria, Denmark, India, Luxembourg, the Netherlands, Norway, the Philippines, and the United Kingdom have acceded to this Convention in respect of the International Labour

Organization. However, as in the case of the *laissez-passer* issued under the Convention on the Privileges and Immunities of the United Nations, in practice the great majority of states Members of the International Labour Organization accept and recognize this *laissez-passer*, although not legally bound to do so.

VI. *Application of* laissez-passer *to the International Court of Justice*

It will be appreciated that the issue of *laissez-passer* under the authority of the Convention on the Privileges and Immunities of the United Nations does not extend to the Judges and Registrar of the International Court of Justice. Moreover, the officials of the Court are not officials of the United Nations within the terms of Resolution 76 (I). For these reasons the General Assembly adopted Resolution 90 (I)[1] on 11 December 1946, paragraph 6 whereof reads as follows:

> '(*a*) The authorities of Members should recognize and accept United Nations laissez-passer, issued by the International Court of Justice to the members of the Court, the Registrar and the officials of the Court, as valid travel documents, taking into account the provisions of sub-paragraph (*b*).
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> '(*b*) Applications for visas (where required) from the judges of the Court and the Registrar should be dealt with as speedily as possible. All other holders of laissez-passer should receive the same facilities when the applications for visas are accompanied by a certificate that they are travelling on the business of the Court. In addition, all holders of laissez-passer should be granted facilities for speedy travel.
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> '(*c*) Similar facilities to those specified in sub-paragraph (*b*) should be accorded to experts and other persons who, though not the holders of United Nations laissez-passer delivered by the International Court of Justice, have a certificate that they are travelling on the business of the Court.'

In consequence of the terms of this Resolution, the Court in June 1950 issued its first *laissez-passer*. They are signed by the President of the Court and by the Registrar, and their contents are identical with the regular United Nations *laissez-passer*.

VII. *United Nations certificates*

Provision is made in Section 26 of Article VII of the Convention for the issue of certificates to experts and other persons who, though not holders of United Nations *laissez-passer*, are travelling on the business of the United Nations. There are various types of persons who are entitled to these certificates but not to the *laissez-passer*; however, they are all persons who, although not being United Nations officials themselves, are nevertheless connected with the Organization in their official capacity. United Nations certificates have been issued, for example, to the members of the International Law Commission, who are individual experts and not governmental representatives. Again, they have been issued to members of the Advisory Committee on Administrative and Budgetary questions, who have a similar status. Generally those persons who are entitled to United Nations certificates are those to whom Article VI of the Convention refers, namely: 'experts on missions for the United Nations.' The privileges and immunities which these persons enjoy by virtue of this Article are to be distinguished from those enjoyed by representatives of Member states under Article IV and by officials of the United Nations under Articles V and VII.

Mention may finally be made of the United Nations Family Certificate, which is issued to the husband, wife, or dependent children of the holder of a *laissez-passer* (or United Nations certificate) which, although not a valid travel document in itself, serves to identify the traveller as a member of the family of the holder of a *laissez-passer* (or United Nations certificate), and is particularly useful in some cases where such persons are travelling alone.

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[1] For the legal authority of such a Resolution see 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', by F. Blaine Sloan in this *Year Book*, 25 (1948), p. 1.

MICHAEL BRANDON[1]

ANGARY AND REQUISITION OF NEUTRAL PROPERTY

IN time of war a state is entitled to requisition the property of neutral subjects—as, generally, it is entitled to do so in time of peace in relation to alien property—provided that it pays compensation. Probably this need not amount to full compensation —although, if the compensation were disproportionately low, it would approximate to confiscation and the state would incur a corresponding international responsibility. However, so long as reasonable compensation is granted and so long as there is no discrimination against the neutral as compared with the state's own subject or with other neutrals, both the requisition and the compensation (if not discriminatory or patently inadequate) must be regarded as warranted by international law. The reason for that rule of international law is that, barring the case of outright or virtual confiscation, the resident alien—and his goods—share the fate of the resident national. They are subject to the municipal law of the state whose protection they enjoy. That protection warrants the imposition of certain duties upon resident neutrals such as, for instance, liability to various kinds of national service (other then direct military service) or interference with their property.

On the other hand there is a consensus of views and practice that in the case of angary, as distinguished from requisition, *full* compensation is the rule.[2] If that is so it would seem preferable from the point of view of the state to take neutral property by way of requisition rather than *jure angariae*. For, it must be noted, there is no difference between requisition and angary so far as the nature of the title and the power of disposition acquired by either of these two modes of taking are concerned. There is nothing (except in the matter of compensation) which the state can acquire by requisition which it cannot acquire *jure angariae*, and there is nothing (except in the matter of compensation) which it can acquire *jure angariae* which it cannot acquire by a simple requisition. This being so why does international law—and municipal law—distinguish occasionally between these two methods of dispossessing the neutral of his property? The reason is that there are contingencies in which by international law requisition of property of neutrals is improper but in which taking by way of angary is the proper procedure. What are these contingencies and what are the reasons for that exception? They were laid down with some clarity in *Commercial and Estates Company of Egypt* v. *Ball*[1] and in *The Zamora*.[2] They coincide largely with the reasons, given above, why requisition of the property of neutrals is, in general, lawful. The explanation of the propriety and admissibility of requisition is that the neutral by permanently and voluntarily residing in the country and by keeping his goods there identifies himself with the country and that by obtaining the protection of the Crown he must be deemed to submit himself to incidental burdens and obligations (including that of requisition on the same footing as the subject).

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[1] Of the Legal Department, United Nations Secretariat. Grateful acknowledgement is made to Mr. William W. Cox and to Mr. Walter Squire for their assistance in the preparation of this Note. The views expressed herein are the personal views of the author.

[2] See Colombos, *The Law of Prize* (3rd ed., 1949), p. 315: 'The only rule which can be laid down with some confidence is that the right of angary—if exercisable at all—may only be exercised by a belligerent for strategical purposes of immediate necessity. It imposes, in every case, the obligation upon the captor to make full compensation for property so appropriated.' See also Higgins and Colombos, *International Law of the Sea* (1943), pp. 389, 390. Professor Wilson in *American Journal of International Law*, 24 (1930), p. 698 (in an article entitled 'Taking over and Return of Dutch vessels, 1918–1919') says: 'The principles of international law require full compensation without regard to technicalities and with presumption always in favour of the owner . . . .' See also Bullock in an article entitled 'Angary' in this *Year Book*, 3 (1922–3), pp. 128, 129. In Oppenheim's *International Law*, vol. ii (6th revised ed. by Lauterpacht, 1944), it is stated at p. 623: '. . . In every case [of the exercise of the right of angary] the neutral owner must be fully indemnified.' In connexion with the often cited case of the exercise of the right of angary by Germany in the Franco-Prussian war in respect of seven British colliers, the indemnity paid by Germany, who fully accepted the British demands, included: (1) the value of the ships and 25 per cent. in addition; (2) the highest value of the cargoes at the time of acceptance and the place of shipment; (3) 5 per cent. interest on the sums so ascertained (see Spaight, *War Rights on Land* (1911), p. 512). A memorandum prepared in this connexion for the British Government by H. C. Rothery, of the Doctors' Commons, stated: 'It seems now to be generally admitted that the German Government were entitled, provided that they made full compensation to the owners, to take possession of these vessels and to sink them for the purpose of protecting themselves against the hostile attacks of the French vessels of war. . . . It is, therefore, clearly not a case for penal, or, as it is sometimes called vindictive damages; on the other hand, the parties are entitled to a full and liberal compensation for the losses sustained, or *restitutio in integrum*, and that, as I understand, the German Government are willing to give' (61 *British and Foreign State Papers*, pp. 599, 600). A full survey of state practice in the matter of angary will be found

If that explanation is correct, then requisition is improper, as laid down in the two cases cited, if the goods are brought to the country without the neutral's consent or if they are brought there for purely temporary purposes, under stress of circumstances and, in particular, in order to avoid capture by the enemy. The proposition that requisition is improper and that, therefore, angary is the only permissible alternative in cases where the goods have been brought into the country without the owner's consent was laid down in emphatic language by Mr. Justice Bailhache in *Commercial and Estates Company of Egypt* v. *Ball*[3] and by Lord Parker in *The Zamora*.[4] He said: 'In general, property belonging to the subject of one Power is not found within territory of another Power without the consent of the true owners and this consent may well operate as submission to the municipal law.' He added: ' a distinction may perhaps be drawn in this respect between property the presence of which within the jurisdiction is of a permanent nature and property the presence of which within the jurisdiction is tem-

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in the volume of the Harvard Research Bureau containing a *Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, 1939, pp. 359–85. A Tribunal of the Permanent Court of Arbitration in the *Norwegian Shipowners Claims* case against the United States awarded damages based on loss of profits with respect to requisitioned Norwegian ships under construction in the United States (Scott, *The Hague Court Reports*, 2nd Series, 1932, pp. 57–66). For an award of damages for loss of profits and insurance (though not of overhead expenses) and of interest of 5 per cent. in a case arising out of detention of a neutral vessel, see *Royal Holland Lloyd* v. *United States*, decided in 1931 by United States Court of Claims: *Annual Digest and Reports of Public International Law Cases*, 1931–2, Case No. 229. See also the decision of the Greco-Bulgarian Mixed Arbitral Tribunal in *Katrantsios* v. *Bulgaria* reported as Case No. 346 in the *Annual Digest of Public International Law Cases*, 1925–6. And see the decision, given in 1946, by the Court of Appeal of Aix (France) in *Ministre de la Marine* v. *Cie Franco-Tunisienne d'Armement* (*Dalloz*, 1948, p. 155), where the Court held that 'the right of angary must be regarded as special requisition the legal consequences of which are not subject to the principles of the ordinary law'.

[1] See below.

[2] [1916] 2 A.C. 77.

[3] (1920), 36 Times L.R. 526.

[4] [1916] 2 A.C. 77, at p. 100.

porary only'.[1] Similar—almost identical—language was used by Lord Atkin in *Commercial and Estates Company of Egypt* v. *Board of Trade*.[2] In the international sphere, in the arbitration of 1922 between Norway and the United States, Norway, in her argument—which was successful—relied on a similar distinction. She said:[3]

> 'The distinction between the right of angary and the right of requisition, so far as concerns neutral property, is that the former relates to neutral property temporarily within the State, and not belonging to or associated with the national domain, such as a neutral ship within the belligerent port, while the latter relates to property incorporated in the mass of things really belonging within the territory of the State.'

In an unreported case, *In re Kettaneh Brothers' Petition of Right*, which came before an English court in 1950, the two distinguishing features of angary—the involuntary nature of the bringing of the neutral goods into belligerent territory and the consequent right to full compensation—were at issue (although the case was eventually settled by agreement and no judgment was given by the court). In that case the petitioners, a Lebanese firm, bought a consignment of motor lorries in the United States and transported them via Egypt to the Lebanon in the summer of 1941. In view of the difficult military situation at that time and the consequent shortage of shipping able to proceed to Beirut the petitioners arranged for the transport of the lorries by sea to Palestine from where they intended to convey them by road to the Lebanon. While in Palestine the lorries were taken over by the British military authorities. There was disagreement between the parties as to whether the lorries were taken over by virtue of a contract or by virtue of requisition in pursuance of the Palestine Defence Regulations. The latter provided for the right of requisition at fixed rates of compensation. The petitioners maintained that, unless the goods were taken by virtue of an agreed contract, the requisition amounted to an exercise of the right of angary which entitled them to full compensation as distinguished from that fixed by the Regulations. They admitted that the vehicles were brought into Palestine in pursuance of an apparently free decision of the owners. But was that decision really free? The petitioners contended that the goods were brought to Palestine under the impact of a real and immediate threat of capture by the enemy. Following upon the enemy break-through at Alamein and his advance upon Alexandria the situation, as the petitioners—and others—saw it, became fraught with imminent danger. There was an acute shortage of shipping. The petitioners were unable to find a vessel able or willing to take the vehicles to Beirut, which was their original and final destination. In these circumstances they felt compelled to convey the vehicles in a vessel which was available and which was proceeding to Haifa. They made immediate arrangements for taking them thence by road to Lebanon. The execution of these arrangements was delayed and finally abandoned for the reason—they contended—that, assuming that no purchase actually took place, they were led to believe that it was about to take place. Could it be said that, in these circumstances, their consent was 'free' and the vehicles could fairly and reasonably be regarded as brought into Palestine for any purpose less temporary than mere transit? They contended that in these circumstances of stress and confusion it was hardly permissible to apply to these vehicles the principles covering requisition of neutral goods brought permanently and willingly into the country. If these vehicles had been on a foreign vessel proceeding to Beirut and if the vessel had been compelled by stress of weather to enter the port of Haifa could they have properly been held to have entered

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[1] Ibid.

[2] [1925] 1 K.B. 271, at p. 293.

[3] As quoted by Wilson in *American Journal of International Law*, 24 (1930), p. 698.

Palestine with the consent of the owners? The petitioners resorted to analogy drawn from a different sphere. They relied on a series of cases[1] showing that, for reasons of fairness and humanity, states have often refrained from exercising jurisdiction over foreign vessels entering their ports in distress. As Lord Stowell said in *The Eleanor*:[2] 'Real and irresistible distress must be at all times a sufficient passport for human beings under any such application of human law.' In the view of the petitioners the analogy was both persuasive and compelling. It would be, they contended, harsh and unreasonable to treat the entry of goods in the circumstances in which they brought them into Palestine as constituting entry, for permanent incorporation into the common stock of the country, with the consent of the owners, and to apply to them the rigours of requisition in the same way as to persons permanently resident in the country and to goods freely brought there. For these reasons the petitioners relied on the suggested extension of the doctrine of 'free consent', as enunciated in the cases referred to above,[3] as one of the consequences of the law relating to the right of angary.

However, the question arises as to whether, even assuming that the case was one of angary, the petitioners were entitled to full compensation seeing that the scale of compensation had already been fixed by the Defence Regulations. The question thus put is one of the judicial application of municipal law seemingly inconsistent with international law—a question which is treated exhaustively elsewhere in this volume.[4] If the case was, according to international and English law, one of angary and if, nevertheless, an English statute purported to fix compensation in a way contrary to accepted rules of international law in the matter, what was the attitude properly to be taken by the court? It is submitted that it was open to the petitioners to argue: (*a*) that in so far as the Regulations deliberately and expressly ignored the law of angary, which (as laid down in the cases cited above) is part of the law of the land, they were, *pro tanto*, *ultra vires* and need not be applied; and (*b*) that there was no proof that that was their intention. Both these propositions were applied in 1920 and 1924 in the two stages of the *Commercial and Estates Company of Egypt* case. It will be noted that the terms of the Defence of the Realm Regulations of 1917[5] were as unqualified as those of the Palestine Defence Regulations, 1939. However, in the absence of a clearly expressed intention to derogate from the principles of international law in the matter of angary, the courts declined to interpret them literally. As Mr. Justice Bailhache said in *Commercial and Estates Company of Egypt* v. *Ball*:[6]

> 'In terms it [the Regulation] was very wide, and the words would include the case of a neutral, of a person who was not a British subject and did not carry on business here and did not owe allegiance to the municipal law of this country. But obviously the Regulation must be qualified in some way . . . . Apart from the Regulation, it was clear that a neutral's goods could not be taken without full compensation; so if the Regulation applied to the case of a neutral, it authorized the Controller to take the property of a neutral and only to pay the compensation contemplated by the Regulation—that is to say, it intended to make a vital change in a neutral's position when his goods had got to this country *without his consent*. He was not saying that a Regulation could not make such a vital change, but if it did so, it must do so in perfectly clear, express words, and the general words of the Regulation were, in his opinion, not enough. The Regulation was a perfectly good Regulation in itself, but it had no application in this case.'

[1] Enumerated in 8th edition of vol. i of Oppenheim's *International Law*, p. 456, n. 4.

[2] (1809), Edward's Admiralty Reports, 135, at p. 159.

[3] See pp. 456, 457.

[4] See Miss Morgenstern's article in this volume, above, pp. 42–92.

[5] Reproduced as an annex to the decision of 1924: [1925] 1 K.B. at p. 298.

[6] (1920), 36 Times L.R. 527.

Similar language was used four years later by the Court of Appeal in *Commercial and Estates Company of Egypt* v. *Board of Trade* (*ubi supra*). There the majority of the Court held that if the Regulation was *ultra vires*—and they were not prepared to say that it was so—it was immaterial that the seizure purported to be under the Regulation.[1]

For these reasons the explicit and categorical language of the Defence Regulations, 1939, was not necessarily fatal to the petitioners. As mentioned, notwithstanding their apparent comprehensiveness, the terms of these Regulations did not irresistibly lead to the conclusion that the intention was to derogate from an accepted principle of international law in the matter of angary which, as Lord Atkin pointed out in the *Commercial and Estates Company of Egypt* case, had become part of English domestic law. It is a principle of construction uniformly acted upon by English courts that, if only possible, statutes must be interpreted so as not to imply a conflict with international law. This is what the courts did in the 'angary' cases referred to above.[2] It is only if that principle of construction is applied that we can avoid the contingency of the law relating to angary being swept overboard by the simple expedient of dealing with all neutral property, in all imaginable situations, by way of requisition in pursuance of Defence Regulations. Undoubtedly, if these Regulations had provided expressly and unequivocally that they applied in spite of international law relating to angary, then the courts would have had to apply them and the neutral owner would have had to rely on diplomatic remedies—just as the petitioners in the present case might have had recourse to that remedy in case they had been unsuccessful in the action. In general, however, English courts have been disinclined to act on a construction imputing to the legislature the intention to disregard the international obligations of this country.

H. L.

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[1] See the observations of Lord Justice Scrutton in *Netherlands American Steam Navigation Company* v. *H.M. Procurator General*, [1926] 1 K.B. 84, 99.

[2] See pp. 57 and 58 of the writer's article in the *Transactions of the Grotius Society* of 1939 and entitled 'Is International Law a Part of the Law of England?' where there will be found numerous references to the application of that principle of construction. And see Miss Morgenstern's article in this volume, above, pp. 42–92.

DECISIONS OF ENGLISH COURTS DURING 1949–1950 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. Public International Law

Jurisdictional Immunities of Foreign States

1. *Dollfuss Mieg et Compagnie S.A.* v. *Bank of England*, [1950] 1 All E.R. 747. The facts in this case and the judgment of Jenkins J. in the court of first instance have already been analysed at length in a previous volume of this *Year Book.*[1] Briefly, the facts were that in 1944 the Germans looted sixty-four gold bars from a French bank, which was holding them for the plaintiff company. The gold bars were later recovered by the United States forces and deposited in the Bank of England. The plaintiffs started an action against the Bank of England claiming delivery of the bars or damages for their conversion. The defendants argued that the Court had no jurisdiction to entertain the action as the bars were in the possession or control of the Governments of the United States, France, and the United Kingdom, and that the action accordingly impleaded two foreign sovereign states (the United States and France), who declined to submit to the jurisdiction. Jenkins J. found for the defendants and the plaintiffs appealed. During the hearing of the appeal, certain new facts came to light. It was found that, although the Bank had intended that the bars should be kept apart from its pool and be held as individual bars for the three Governments, it had in fact failed to take one of the various steps necessary to create an exception to its general rule (which is to credit the customer with the quantity of ounces of fine gold discovered on assay) and had inadvertently sold thirteen of the bars.

It was held by the Court of Appeal (Sir Raymond Evershed M.R., Somervell and Cohen L.JJ.), that, as the Bank had failed to segregate the sixty-four bars, the bars were not at the relevant date in the possession of or under the control of the three Governments. Therefore the company's action against the Bank was allowed to proceed and the decision of Jenkins J. in the Court below ([1949] 1 All E.R. 946) was reversed on facts which were not then before the judge.

Nevertheless, as the matter was one of public importance, the Court of Appeal thought it right to express their views on the main issues. On these they held:

(i) (Sir Raymond Evershed M.R. *dissenting*) Assuming that the gold bars were returnable by the Bank to the three Governments on demand, the bars had not ceased to be under the control of the three Governments when deposited with the Bank. The immunity of a foreign sovereign state from process in the municipal courts was not lost by a temporary bailment for safe custody of property of which that state had had *de facto* possession.

(ii) If the company were not entitled to claim the return of the bars, they equally were not entitled to claim damages for detinue or conversion of the bars.

The chief point of interest in this case concerns the interpretation of Lord Atkin's well-known statement in *Compania Naviera Vascongado* v. *Cristina S.S.*, [1938] A.C. 485, at p. 490, that 'the courts of a country will not implead a foreign sovereign' and that 'they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control'.

Counsel for the plaintiffs argued that the statement was not applicable to this case, as this action was *in personam*, whereas the action in the *Cristina* case was an action *in rem*. It was not in dispute that the foreign states were not impleaded, but counsel for the plaintiffs was also compelled to argue, first, that the foreign states were not in possession or control of the gold bars; secondly, that, even if they were in possession or control of the gold bars, the award of damages would not involve interference with such possession or control. The Court of Appeal rejected both these arguments, Cohen L.J. in particular stating that Lord Atkin's propositions were of general application and not confined to ships. Sir Raymond Evershed, on the other hand, thought that the foreign states were not in possession of the gold bars. He also held that 'there is a real distinction, as regards this matter of immunity, between actions *in rem* and actions *in personam*'. This view appears to be inconsistent with the observations of Lord Wright in the *Cristina* case and with the judgment of the Court of Appeal in *Haile Selassie* v. *Cable and Wireless Ltd.*, [1937] Ch. 839. It would also lead to much inconvenience in practice. As Brett L.J. said in *The Parlement Belge* (1880), 5 P.D. 197, to place a foreign sovereign in such a position that he must sacrifice either his property or his independence is 'a breach of the principle upon which his immunity from jurisdiction rests'. This principle is in turn 'his absolute independence of every superior authority'.

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[1] This *Year Book*, 26 (1949), pp. 464–6.

It is unfortunate that in this case the fundamental principle of the jurisdictional immunities of states became so involved with the niceties of the English law of bailment. From the point of view of international law, perhaps the most interesting feature of the case was the suggestion put forward, *obiter*, by all the members of the Court of Appeal that the granting of jurisdictional immunities should be made dependent upon reciprocity. Some support for this suggestion was found in the judgment of a United States district court in *Long* v. *The Tampico* (1883), 16 Federal Reporter 491, 495, to the effect that jurisdictional immunities rest upon 'international comity' and 'tacit agreement'. It goes without saying that states cannot be expected to grant jurisdictional immunities to other states indefinitely on a unilateral basis, but the Anglo-American case-law on this subject has become so rigid that a change would probably require legislation.

Recognition. Retroactive Effect of Recognition

2. *Boguslawski and Another* v. *Gdynia Ameryka Line*, [1950] 2 All E.R. 355. This case concerns the retroactive effect of the recognition of foreign governments. During the Second World War the Polish merchant navy was controlled by the exiled Polish Government in London, which was recognized by His Majesty's Government. On 28 June 1945 the Polish Provisional Government of National Unity was established in Poland. On 29 June 1945 it wrote to the British Government asking for recognition. On that very day the Polish Government in London made a decree (*a*) to determine the employment of its civil servants and pay them a gratuity of three months' salary, and (*b*) to pay a similar gratuity to the office staffs of its shipping companies on determination of their employment, the gratuity in this case to be paid out of the funds of the companies concerned. On 3 July 1945, in response to an inquiry, the Minister of Industry, Commerce, and Shipping of the Polish Government in London dictated a telegram stating that, on the authority of the Government, seamen who left their ships on account of the impending recognition of the new Government in Poland by the British Government, should be treated in the same way as the office staffs of the shipping companies. At midnight on 5/6 July 1945 the British Government recognized the new Polish Government.

The plaintiffs in this action were two seamen in the *Morska Wola*, a motor vessel belonging to the defendant company, which was then in the Manchester Ship Canal. Having left the vessel on 7 July and 11 July respectively, they demanded payment of the compensation alleged to be due to them. The defendants denied liability, alleging that the recognition of the new Polish Government by Great Britain operated retroactively to 28 June 1945. Consequently, the acts of the old Polish Government done after that date should be regarded as having no validity. In the court of first instance, Finnemore J. gave judgment for the plaintiffs.[1] The basis of his decision was that, although *Luther* v. *Sagor*, [1921] 3 K.B. 532, established the principle that 'when this country recognizes a government of a foreign country as being the government, the recognition dates back to the time when that government became the effective *de facto* government', this case was different.

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[1] See this *Year Book*, 26 (1949), p. 468.

For this there were two reasons. First, the old Government in London was the only Polish Government which had in fact at the material time any control over the Polish seamen concerned. Secondly, the Foreign Office certificate announced the precise date and hour at which the change of recognition took place.

Held by the Court of Appeal,

(i) The terms of paragraph 1 of the Foreign Office certificate settled the issue. This stated: 'Up to and including midnight of 5/6 July 1945, His Majesty's Government in the United Kingdom recognized the Polish Government having its headquarters in London as being the government of Poland, and as from midnight of 5/6 July 1945, His Majesty's Government in the United Kingdom recognized the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognize the former Polish Government having its headquarters in London as being the government of Poland.'

Therefore, said Cohen L.J., at p. 363: 'It seems to me, as it did to the learned judge, that, where the Secretary of State certifies that His Majesty's Government recognizes one government up to midnight on a specified day and another government thereafter, the position is the same as if a Secretary of State were to certify, for example, that His Majesty's Government recognized the government of one absolute monarch at his death and the government of his son and heir thereafter'.

(ii) Even, however, if the Foreign Office certificate had not been in this form and the matter had been governed by the principle laid down in *Luther* v. *Sagor*, it was doubtful if the defendants would succeed. The difference was that *Luther* v. *Sagor* was concerned with the validity of acts done by the foreign government in territory under its *de facto* control, whereas in this case there was no doubt that, in the period up to midnight on 5/6 July 1945, the old Polish Government was in *de facto* control of the Polish merchant navy in England. The following words of Stone J., delivering the judgment of the United States Supreme Court, in the well-known case of *Guaranty Trust Co.* v. *United States* (304 U.S. 140), were approved by Cohen L.J.: 'It does not follow that recognition renders of no effect transactions with a prior recognized government in conformity to the declared policy of our own government. The very purpose of the recognition by our government is that our nationals may be conclusively advised with what government they may safely carry on business transactions.' It made no difference, said the learned judge, that the plaintiffs were Polish nationals because 'the English sovereign affords his protection, not only to British subjects, but to foreigners for the time being in England'.

The effect of this decision is in any case to restrict the potentially wide application of the principle of *Luther* v. *Sagor*, whilst, taken in conjunction with a Foreign Office certificate, drafted in a sufficiently explicit manner, it altogether disposes of the danger, inherent in cases such as *U.S.* v. *Pink* (315 U.S. 203), of the growth of a new doctrine in international law whereby extraterritorial effect would be given to the rule of retroactivity of recognition.

The Enforcement of International Agreements in English Courts.

3. *The Republic of Italy* v. *Hambro's Bank*, [1950] 1 All E.R. 430. The decision in this case, which might have been expected to raise important issues of international law, turned on the construction of a particular Order in Council. Its direct significance is, therefore, limited. Nevertheless certain observations of Vaisey J. are relevant to the perennial problem of the incorporation of international law into municipal law and of the attitude of the English courts to that problem.

King Victor Emmanuel III possessed a private fortune in the United Kingdom, consisting of cash, British Government securities, and other investments. On the outbreak of war between Great Britain and Italy in 1940 this became vested in the Custodian of Enemy Property. Following the death of the King in 1947 letters of administration were granted to Hambro's Bank as attorney administrators. In 1949 the Custodian of Enemy Property, having paid estate duty on the King's estate, transferred the balance to Hambro's Bank. The Republic of Italy then claimed a declaration that, by reason of the Financial Agreement between the United Kingdom and Italy, this transfer by the Custodian was a breach of his obligations, and also an injunction to restrain Hambro's Bank from dealing with the property. The Financial Agreement[1] was signed on 17 April 1947, and came into force on 15 September 1947. The Treaty of Peace itself between Great Britain and Italy[2] was signed on 10 February 1947, and came into force on 15 September 1947. On 29 April 1947 the royal assent was given to the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary, and Finland) Act, 1947.[3] This Act empowered His Majesty to make Orders in Council to give effect to the Treaties of Peace. Article 79 of the Peace Treaty provided that 'Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property rights and interests which on the coming into force of the present Treaty are within its territory and belong to Italy or to Italian nationals and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Italy or Italian nationals, including debts, other than claims fully satisfied under other articles of the present Treaty'. The Financial Agreement, after setting out the provisions of Article 79 of the Peace Treaty, provided that liquid assets belonging to Italian nationals in the United Kingdom and held by the Custodian of Enemy Property were to be transferred to the Italian Government to be utilized by them for the payment of debts in this country.

On 28 January 1948 an Order[4], under the Treaty of Peace (Italy, Roumania, Bulgaria, Hungary, and Finland) Act, 1947, was made directing that the provisions of Article 79 of the Peace Treaty should have effect as law and that Italian property, rights, and interests charged with the claims therein mentioned should be 'transferred . . . free of any such charge in accordance with the terms of any . . . Agreement with the government of Italy, affecting the said property, rights or interests to which His Majesty is or may be a party. . . .'

It was argued for the Republic of Italy, the plaintiffs, that the Financial Agreement was by this Order made part of the law of this country.

Vaisey J. held that the Financial Agreement was not cognizable or justiciable by the Court, so that the plaintiffs' action failed. The reasons given were:

(i) The words of the Order were permissive, not obligatory.
(ii) The Financial Agreement was not expressly mentioned in the Order.
(iii) There is no authority or principle which enables an English court to hold 'that a contract such as the Financial Agreement made between high contracting parties and having all the appearance of a Treaty can be imported into and incorporated in our domestic law by a mere vague allusion, when there would have been no difficulty at all in doing so expressly and when an obvious opportunity for doing so presented itself'.

As already stated, the result of this case depended upon the interpretation of a particular Order. Its consequence is that, no matter what the intention of the parties signing it, no agreement entered into by His Majesty's Government can be considered part of English law unless it is explicity imported into and incorporated in that law by the appropriate Statute or Order.

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[1] *Financial Agreements between the Government of the United Kingdom and the Italian Government*, Agreement No. III, Annex to No. 6. *Treaty Series*, No. 31 (1947), Cmd. 7118.

[2] *Treaty Series*, No. 50 (1948), Cmd. 7481.

[3] 10 & 11 Geo. VI. c. 23.

[4] Treaty of Peace (Italy) Order, 1948. *Statutory Instruments* (1948), No. 117.

Extradition

4. *Re Henderson. Henderson* v. *Secretary of State for Home Affairs and Another*, [1950] 1 All E.R. 283. In this case an officer of the Royal Indian Engineers was arrested in connexion with certain frauds alleged to have been committed during the retreat from Burma in 1942. He was released on bail, but the alleged frauds were so extensive that a special tribunal was constituted under Indian Ordinances to deal with them. After a long examination by the tribunal the officer was in May 1947 charged with offences contrary to the Indian Penal Code, 1860 (Act 45 of 1860), Section 420. Owing to the division of India into the Dominions of India and Pakistan, and also owing to the death of one of the members of the tribunal and other changes in the constitution of the tribunal (which were provided for by the Ordinances under which the tribunal was set up), the progress of the inquiry was delayed. Meanwhile the officer was transferred to Pakistan and later, owing to some oversight by the British military authorities there, returned to England for demobilization in February 1948. He then obtained civilian employment in England. As he failed to reappear before the special tribunal in India, a warrant was issued for his arrest, and this warrant was endorsed, under the Fugitive Offenders Act, 1881, Section 3, by the metropolitan magistrate at Bow Street. Later, deciding that a prima facie case had been made out against the officer, the Bow Street magistrate committed the officer to prison under Section 5 of the Act of 1881, to await his return to India. The officer then made an application to the Court of Appeal for leave to serve short notice of a motion for relief under Section 10 of the Act of 1881. This section states: 'Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.' The officer's application, which was granted, was made *ex parte*, but notice of the intention to make it was given to the Home Secretary and the High Commissioner for India (the proposed respondents). This motion was heard by the Court of Appeal in July 1949, but adjourned until November 1949 to enable the parties to produce further information.

It was argued for the applicant that the Court has a wide discretion under Section 10 of the Act of 1881 to refuse extradition; that too long a time had elapsed since the charges were first made, so that the applicant would have difficulty in dealing with matters raised against him or in adducing witnesses; that the constitution of the special tribunal had entirely changed; finally, that the action of the Government of India in pressing for extradition was oppressive and would result in undue hardship to the applicant.

The Court of Appeal held that the issue depended upon the interpretation of Section 10 of the Act of 1881. In this respect, although the Court has a wide discretion, it should only exercise it 'where it appears that the contemplated proceedings, although, perhaps, lawful by the law of the country concerned, are really going to be conducted in a way contrary to natural justice or contrary to our ideas of it'.

That might occur if 'the punishment entailed in being returned was in the circumstances out of all proportion to the gravity of the offence'. That was not true of this case, even though the long delay and the changed nature of the tribunal might appear to constitute a hardship. But 'it is not sufficient to say: "That would not be the procedure in this court. That would appear to entail hardship." ' In the light of the evidence the Government of India's action was not oppressive and, therefore, the application must be dismissed.

This case requires little comment. It may be noted, however, that the Fugitive Offenders Act, 1881, applies only in cases where the offence was committed in one part of H.M. dominions and the prisoner is found in another part of those dominions. The Extradition

Act, 1870, which is applicable when the offence was committed within the jurisdiction of a foreign country, contains no provision corresponding to Section 10 of the Act of 1881. The difference is no doubt due to the fact that, in addition to various other safeguards—of which the non-extradition of political criminals is the most important—the Extradition Act lists specifically all the extraditable crimes, whereas the Fugitive Offenders Act applies to 'every offence, whether called felony, misdemeanor, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment'.

Prize Law. Involuntary Use of Enemy Flag.

5. *The Unitas*, [1950] 2 All E.R. 219. This case is one of the few interesting prize cases to have emerged as a result of the Second World War. N.V., a Dutch corporation, owned a number of subsidiaries in Germany. Because of German 'blocked mark' legislation, substantial assets, due from the subsidiaries to N.V., became frozen. Under a threat from Germany that, if it did not co-operate, its assets in Germany would be confiscated, N.V. agreed to build in Germany a whaling fleet for operation under the German flag. The terms were that the fleet, when built, should be transferred to a new company, in which N.V. would not have more than a 50 per cent. interest, and that the ship should not be transferred from the German flag without the consent of the German Government. In 1937 the *Unitas*, the chief unit of this whaling fleet, was registered in Bremen as a German ship and in 1938 she performed a whaling voyage. In June 1945 she was seized in prize by the Allies in the port of Wilhelmshaven, whilst flying a German flag and still under German registry. N.V. claimed the release of the vessel on the ground that she was placed under the German flag involuntarily and under duress. The matter came before Lord Merriman P. in the Prize Court on 20 February 1948. He pronounced that the *Unitas* was subject to capture as good and lawful prize.[1]

On appeal, the Judicial Committee of the Privy Council held that, although many interesting issues were raised by this case,[2] 'the Board think that the flying of the enemy flag alone is in this and in most cases sufficient to dispose of the matter at issue'. There are undoubtedly exceptions to this rule, as the Board admitted. Sir William Scott in *The Vrow Elizabeth*[3] and Sir Samuel Evans P. in *The Tommi*[4] expressly envisaged the possibility of exceptions. In the case of *The Palme*[5] the French prize court released a Swiss (neutral) vessel flying the German (enemy) flag. In the case of *The Taxiarchis*,[6] a vessel which was owned and registered in Cyprus, then nominally under Turkish sovereignty but actually under British administration, was seized by the Italian Navy, during the war between Italy and Turkey, whilst flying the Turkish flag. She was released by the Italian prize court, which took account of the neutrality of Cyprus.

These cases, however, were unusual in that the owners had no national flag of their own. In *The Pontoporos*[7] a Greek ship had been captured by the *Emden* and, with a German prize crew on board, had been used as a coaling auxiliary by the enemy, when she was recaptured by the British and later released. The Board referred to this case as a

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[1] [1948] 1 All E.R. 421.

[2] One of these concerned the question whether the principle of *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ltd.*, [1916] 2 A.C. 307, applies in reverse; i.e. is it the duty of the Court to look behind the legal façade and determine whether the true ownership of the corporation or vessel concerned, although it appears to vest in the enemy, does not in fact vest in a neutral? In *The St. Tudno*, [1916] P. 291, it was held on the basis of the decision in the *Daimler* case that a vessel owned by a British company and flying the British flag was nevertheless an enemy ship.

[3] (1803), 5 Ch. Rob. 2.

[4] [1914] P. 251.

[5] Dalloz, *Jurisprudence générale* (1872), Part III, p. 94.

[6] *Revue générale de Droit International Public*, 20 (1913), p. 267.

[7] (1915), 1 Br. and Col. Pr. Cas. 371.

'true example of involuntary submission to enemy duress', whereas the action of N.V. in building the whaling fleet and placing it under German registry 'was not involuntary in the sense of being unintentional. It was a deliberate choice taken between distasteful alternatives. It was only involuntary in the sense that the appellants would have preferred not to make a choice at all.' There was an apt precedent in *The Carolina*.[1] In this case a Swedish ship was pressed into service as a French transport without the consent of the master, although the master subsequently insured and provisioned the vessel. Sir William Scott, rejecting the argument that the master was acting under duress, said: 'A man cannot be permitted to aver that he was an involuntary agent in such a transaction. If an act of force, exercised by one belligerent on a neutral ship or person, is to be deemed a sufficient justification for any act done by him, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act.' As, therefore, the *Unitas* was not flying the German flag solely because of involuntary submission to enemy duress, she did not come within the exception to the rule that all vessels flying the enemy flag may be condemned; consequently her condemnation was lawful. Harsh though the decision may seem, it is satisfying to note that it is supported by good and long-standing authority and that it rests upon a more secure foundation than the much-abused doctrine of 'reprisals'.

D. H. N. Johnson

B. Private International Law

Domicil

No. 1. *Midland Bank Executors and Trustee Co.* v. *Commissioners of Inland Revenue*[2] is yet another case on domicil which raised no new legal problem, but which illustrates the difficulties with which the courts have to contend when applying the recognized rules on domicil to complicated and ambiguous facts.

The testator was born in 1871 in Burma. His father had a Scottish domicil of origin, but during the minority of the testator he settled in England. The son married in England in 1904 and resided there until 1914, when he joined up. After his demobilization he went to the Dominican Republic. He set up a business and remained there for the rest of his life, except for occasional visits to England. His wife, finding the climate in the Dominican Republic unsuitable, returned to England, where she continued to reside with the daughter of the marriage. In 1938, when in England, the testator made a will in English form. Subsequent correspondence showed that the testator had not, during the period between 1939 and 1944, made up his mind whether to stay in the Dominican Republic indefinitely, although he expressed a preference for the better climate, easier living conditions, and lighter burden of taxation in 'America'. In 1945 he retired from business, and went to live with friends in their house in the Dominican Republic, where, at his request, a new wing was added to accommodate his library. Plans which had existed during the war of 1939–45, that his wife should join him, were not followed up any longer.

The plaintiffs issued a summons to determine whether the testator was domiciled in England, in the Dominican Republic, or elsewhere at the time (i) when the will was made and (ii) when he died.

Danckwerts J. held that up to his retirement in 1945 the testator retained his English domicil of choice, which he had acquired when his father settled in England. Assessing the relevance, respectively, of the long residence of the testator in the Dominican Republic, and of the residence of his family in England, where he returned from time to time, his Lordship said:

'where matters of business are concerned it does not seem to me so conclusive an intention to reside permanently and indefinitely in a place as it is when a man's family and home are also to be found in the same place as he is carrying on his business.'

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[1] (1802), 4 Ch. Rob. 256.

[2] [1950] Taxation Reports 289.

On the other hand, Danckwerts J. held that when he retired from business in 1945, settled in a house in the Dominican Republic and relinquished all plans for joining or being joined by his wife and daughter, the testator did acquire a new domicil of choice in the Dominican Republic.

Nullity of Marriage and Divorce

No. 2. *Risk* (*otherwise Yerburgh*) v. *Risk*[1] establishes a strange limitation upon the exercise of jurisdiction by English courts where a marriage is alleged to be void on the ground that one party had capacity to enter into polygamous marriage, while the other had not.

The petitioning wife, who was domiciled in England, entered into a marriage with the respondent, a Moslem, domiciled in Egypt. The marriage was celebrated in Egypt. According to the marriage contract, and according to his personal law, the respondent was entitled to marry up to three more wives. There was one child of the marriage. The petitioner, relying on the jurisdiction established by the Law Reform (Miscellaneous Provisions) Act, 1949, Section 1 (1) and (2), applied for a decree of nullity on the ground that according to English law, which was the law of her domicil at the time of her marriage, she had no capacity to enter into a marriage with a husband whose personal law allowed polygamy.

Barnard J. dismissed the petition. He referred to *Hyde* v. *Hyde and Woodmansee*,[2] *Srini Vasan* v. *Srini Vasan*,[3] and *Baindail* v. *Baindail*,[4] which established that polygamous marriages, though recognized to a certain extent by English law, cannot be enforced in an English court. The petitioner was therefore not entitled to seek any relief in England. His Lordship admitted that, at first sight, the refusal of English courts to entertain any petition involving polygamous marriage did not exclude the jurisdiction to make a declaratory decree of nullity. Nevertheless, he held that the polygamous nature of the marriage did not allow the court to pronounce such a decree, seeing that a successful petitioner would have the right to apply for maintenance and for the custody of the children of the marriage.

This decision raises a question of some importance. Although the marriage was potentially polygamous, the petitioner was the sole wife. Moreover, she did not apply for maintenance or for custody of the child. In these circumstances it may be asked whether the question of nullity could not have been severed from the question of maintenance and custody. The latter, when raised by a separate application, could have been disposed of on the lines indicated by the learned judge, without prejudice to the power of the court to pronounce a decree of nullity. If the present decision is correct, English courts have no jurisdiction to declare a marriage void on the ground of its polygamous nature for the very reason that it is a polygamous marriage which violates English public policy and cannot be concluded by a party domiciled in England. In effect such a solution is inelegant rather than unjust, for the refusal of the court to annul a marriage on the ground that it is polygamous establishes the petitioner's case, if only by implication, to the effect that the marriage is void.

No. 3. The decision of Hodson J. in *Way* v. *Way and others*,[5] dismissing a number of petitions by British husbands to declare their marriages concluded with their Russian wives null and void was noted in the previous volume of this *Year Book*.[6] Briefly, the petitioners, all British subjects serving with the British Armed Forces in Russia, married between 1942 and 1945 at Russian Civil Registry Offices women of Russian nationality. Upon the failure of the Russian Government to allow the wives to join their husbands, the latter prayed for decrees on the ground, *inter alia*, that the formalities required by Russian law had not been complied with and that the requisite consent to marry had been wanting. One of the petitioners appealed, and was given leave to raise the additional arguments (1) that the marriage did not satisfy the essential requirements of marriage as understood in English law, and (2) that the marriage had been frustrated in consequence of the subsequent actions of the Russian authorities. It was agreed that certain formalities required by Russian law had not been fulfilled when the marriage ceremony was performed by the registrar. Section 2 of the Russian marriage law of 1926 provided that 'registration of a marriage at a Civil Registry Office shall furnish conclusive evidence of the existence of the state of matrimony'.

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[1] [1951] P. 50; [1950] 2 All E.R. 973; 66 T.L.R. (Pt. 2) 918; [1950] W.N. 519; 94 S.J. 707.

[2] (1866), L.R. 1 P. & D. 130.

[3] [1946] P. 67.

[4] [1946] P. 122.

[5] [1950] P. 71; [1949] 2 All E.R. 959; 65 T.L.R. 707; [1949] W.N. 445.

[6] 26 (1949), pp. 474–5.

The Court of Appeal in *Kenward* v. *Kenward*[1] reversed the decision of Hodson J. and declared the marriage void.

1. Sir Raymond Evershed M.R., with whom Bucknill L.J. agreed, held upon the evidence given by the expert witness that notwithstanding Section 2 of the Russian marriage law the validity of a Russian registered marriage could be impeached in a Russian court, and therefore also in an English court. He found as a fact that the Russian authorities had intentionally failed to comply with all the formalities required by Russian law in order to render the marriage invalid in Russia. Consequently English courts were not bound to recognize the marriage as valid in form.

2. As regards the argument that the necessary consent to marry was lacking, the Master of the Rolls agreed with Hodson J. that English law applied, at least in so far as the petitioner was concerned. Under English law nothing short of mistake as to the identity of the other party or an erroneous belief as to the ceremony could vitiate consent. Mistaken belief that the Russian Government would subsequently allow the wife to join her husband in England was insufficient to avoid the marriage.

3. Turning to the contention of the petitioner that the union concluded in Russia was not a marriage in the meaning of English law, seeing that under Russian law the spouses were not under a duty to reside together but were enjoined to fix the place of the household by common consent, the Master of the Rolls dismissed it as irrelevant upon the evidence before him. He held that Russian law did not differ substantially from English law in this respect. It did not involve 'so great a denial of the elementary principles of *consortium*' as would justify the conclusion that the union was no marriage at all.

4. On the assumption that English law applied, Sir Raymond Evershed rejected the novel contention that the marriage had been frustrated through the occurrence of an irresistible and extraneous event. He refused, for this purpose, to draw a distinction between a marriage of spouses one of whom was domiciled in England while the other was domiciled abroad, and a marriage between spouses who were both domiciled in England. Denning L.J., on the other hand, was prepared to rest his judgment on frustration.

(*a*) In the first place he referred to the circumstances in which a marriage is voidable according to English law, but limited the operation of English law to the case where both parties are domiciled in England.

(*b*) In the second place, he examined the substantial validity of a marriage where the parties are domiciled in different countries. On the assumption that the personal law of one party attaches a fundamental condition to the marriage which does not exist in the personal law of the other, he held that the marriage was voidable if the condition failed or was broken.

(*c*) In the third place he illustrated the operation of this principle by two examples:

If a woman domiciled in England marries there a man whose personal law permits polygamy, the marriage is monogamous. If the husband returns to his home land, and marries a second wife, the first wife may apply for a decree of nullity in England. On the other hand, if the marriage takes place in the country of the husband's domicil, the marriage is polygamous, and the first wife cannot complain. After a critical discussion of *Re Bethell*[1] Denning L.J. concluded:

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[1] [1951] P. 124; [1950] 2 All E.R. 297; 66 T.L.R. (Pt. 2) 150; [1950] W.N. 311; 94 S.J. 383.

> 'a marriage may be voidable for failure of a condition imported by the personal law of one of the parties, if they married on the basis of that law.'

5. Although it is possible to agree with the result reached by the learned Judge, it is difficult to accept his premisses. They obliterate, in the first place, the distinction between status and contract, which is well established in the Private International Law of marriage. They disregard, in the second place, that the question whether a marriage is voidable is determined exclusively by the law of the husband's domicil at the time when the petition is brought, which is also the law of the wife's domicil.[2] They rely, in the third place, on the *lex loci celebrationis*, which determines only the formal validity and the monogamous or polygamous character of the marriage, to decide upon the substantial validity of the marriage.

It would appear that both examples discussed by the learned Lord Justice are governed by the same principle, which is that the capacity of spouses is governed by the law of their respective domicils. As pointed out in this *Year Book*[3] what appears to be want of consent or even an incapacity on the part of one spouse is only the reflex of an incapacity on the part of the other. It may be that the husband domiciled in England had no capacity to marry the wife in Russia for the reason that she had no capacity to join her husband in his own country without the consent of the Russian Government.

No. 4. In *Schuck* v. *Schuck*[4] the woman petitioner prayed, *inter alia*, for a declaration that her marriage to the respondent, which had taken place in England in 1944, had been validly dissolved by a decree of divorce granted by a Czech court in October 1947 when the parties were domiciled in Czechoslovakia. Ormerod J. found alternatively that the respondent husband was resident but not domiciled in England at any relevant time or that he had abandoned his English domicil of choice before October 1947, with the result that his domicil of origin revived, which was Czech. It followed that the Czech courts had jurisdiction to dissolve the marriage. He therefore held that the petitioner was entitled to a declaration that the marriage had been validly dissolved and did not subsist since the date of the decree of Czechoslovakia.

The importance of the decision lies in the fact that it establishes, for the first time, the jurisdiction of English courts to entertain a petition for a declaration pronouncing upon the validity of a foreign decree of divorce. Ormerod J. relied on the combined operation of Section 81 of the Matrimonial Causes Rules 1947 and Order 25, Rule 5, of the Rules of the Supreme Court. The latter provided:

> 'No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.'

Declarations that a marriage concluded in England has been validly annulled by a foreign court of competent jurisdiction are not unknown in English law.[5] The present case appears, however, to be the first to apply this procedure to foreign divorces. There can be little doubt that it serves a useful purpose and that it will supersede the usual method of testing the validity of the foreign divorce by a second petition brought in England after one of the parties to the previous marriage has entered into a second marriage, provided always that English courts have jurisdiction to grant a decree of divorce.[6]

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[1] (1887), 38 Ch. D. 220.

[2] *De Reneville* v. *De Reneville*, [1948] P. 100; see this *Year Book*, 25 (1948), p. 429.

[3] 26 (1949), pp. 474–5.

[4] (1950), 66 (Pt. 1) T.L.R. 1179; [1950] W.N. 11.

[5] *Galene* v. *Galene*, [1939] P. 237; *De Massa* v. *De Massa*, [1939] 2 All E.R. 150 n.

[6] See *Donaldson* v. *Donaldson*, [1949] P. 363; *Boettcher* v. *Boettcher*, [1949] W.N. 83; this *Year Book*, 26 (1949), pp. 469, 476.

No. 5. In *Hopkins* v. *Hopkins*[1] Pilcher J. had to consider, for the first time, the limits of the enlarged jurisdiction in divorce which was conferred upon English courts by Section 1 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act, 1949.[2] The petitioning wife asked for a decree of divorce on the ground of the respondent husband's cruelty and constructive desertion. She alleged in the first place that the respondent was domiciled in England. By an amendment to her petition she alleged that even if the respondent had acquired a domicil abroad at the time when the petition was presented, the court had jurisdiction in virtue of Section 1 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act on the ground that she had been ordinarily resident in England for a period of three years immediately preceding the commencement of the proceedings.

The domicil of origin of the respondent was English. The parties were married in England in 1943 and continued to reside there until February 1949, when the respondent went to Canada to find employment. He returned to England in March, and on 15 April 1949 husband and wife went to Canada together. The husband obtained employment there and the parties established a home of their own. On 20 September the wife left Canada for England, where she arrived on 22 September 1949 and where she resided when the petition was filed on 11 October 1949. Pilcher J. held that English courts had no jurisdiction and dismissed the petition, which was undefended.

1. As regards the domicil of the respondent husband, the learned Judge said:

> '. . . In a case of this character all that the wife has to do is to make out a *prima facie* case. If through no fault of the wife's the available evidence is scanty, the wife has discharged her burden, provided that the facts proved tend rather to show that the court has jurisdiction than that it has not. . . .'

His Lordship found that the respondent had acquired a domicil of choice in Canada before the wife presented her petition. Consequently an English court could not take jurisdiction on the ground that the parties were domiciled in England.

2. Turning to the additional jurisdiction of English courts established by Section 1 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act, 1949, Pilcher J. examined the relevant parts of this section, which provides:

> 'The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if (*a*) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.'

Having regard to the petitioner's residence in Canada for a period of five months during the relevant period of three years, his Lordship held that in the absence of continuous residence in England for a period of thirty-six months and in the presence of an exclusive residence in Canada for five months, where the parties had become domiciled, the petitioner was not 'ordinarily resident' in England in the meaning of Section 1 (1) (*a*) of the Law Reform (Miscellaneous Provisions) Act, 1949.

3. This interpretation of the term 'ordinarily resident' appears at first sight to be difficult to reconcile with its corresponding interpretation in other enactments.[3] In the present case it serves to restrict jurisdiction in divorce by requiring some form of continuous residence in England. In income tax law, the term is employed to extend the application of English tax legislation. It is there not understood in a technical sense and connotes less than residence, but a personal quality which attaches if a person spends a substantial part of each year in the United Kingdom either habitually or in the regular course of his life.[4] It follows that for the purpose of liability to income tax a person may

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[1] [1951] P. 116; (1950), 66 T.L.R. (Pt. 2) 896; [1950] 2 All E.R. 1035; [1950] W.N. 518.

[2] Now Matrimonial Causes Act, 1950, s. 18.

[3] Bankruptcy Act, 1914, s. 4 (1) (*d*); Income Tax Act, 1918 s. 46, Case IV, rule 2, Case V, rule 3, Schedule D.; rule 3, General Rules, All Schedules; Summary Jurisdiction (Process) Act, 1881, s. 6; Rules of the Supreme Court, Order XI, rule 1 (*c*).

[4] Sol. J. 95 (1950), p. 51, at p. 52.

be ordinarily resident in several countries at the same time.[1] The same principle applies for the purposes of jurisdiction in divorce. It was the failure of the petitioning wife to establish the continuance of a residential connexion with England when she accompanied her husband to Canada, intending at that time to live with him there, which prevented her from retaining an ordinary, if concurrent, residence in England. In the words of Pilcher J.: 'this is not a case in which it can be, or is, contended that the wife had at the same time two physical residences in either of which it was open to her to reside at will'. The fact that she had in fact resided in England for the greater part of 1949 was therefore rightly disregarded. Length of residence during any given year is neither a positive nor a negative criterion for determining 'ordinary residence'.[2] The decision of Pilcher J. is thus in accordance with the recognized interpretation of the term 'ordinary residence' in other enactments, although it disagrees with its more restrictive interpretation where jurisdiction to grant maintenance orders is concerned.[3]

No. 6. In two cases the Court of Appeal was called upon to decide whether the Court should exercise its discretion to dispense with service of a petition for a divorce. In both cases the Court made orders waiving the requirement of service, but the applications were based upon different legal provisions and the facts were not identical.

In *Paolantonio* v. *Paolantonio*[4] the parties were married in 1944 in England, where the wife was domiciled. The husband was domiciled in the United States. In 1945 the husband left for the United States and informed the wife of his intention never to live with her again. In 1949 a copy of the wife's petition for divorce on the ground of desertion, a memorandum of appearance, and a form of acknowledgement of service were served upon the husband by registered post at his last known address in the United States, but he could not be found there and further inquiries were unsuccessful. The wife therefore applied under Section 42 of the Matrimonial Causes Act, 1857, to dispense with the service on the husband of the petition of divorce. Wallington J. refused the application, but the Court of Appeal reversed the order.

Section 42 of the Matrimonial Causes Act, 1857, provided:

> 'Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such a manner as the court shall by any general or special order from time to time direct, and for that purpose the court shall have all the powers conferred by any statute on the Court of Chancery: Provided always that the said court may dispense with such service altogether, in case it shall seem necessary so to do.'

Tucker J., who delivered the judgment of the Court, found that actual service was impossible and that substituted service by advertisement in a newspaper would be equally ineffective. He considered *Luccioni* v. *Luccioni*[5] and held that the conditions set out by Lord Merriman, to the effect that the respondent must be aware of the fact that the petition is being prosecuted, or of the intention to prosecute it, before the Court could waive the requirement of service, did not constitute a fetter upon the discretion of the Court. In *Weighman* v. *Weighman*[6] the waiver of service was based on a fair inference that the respondent must have known that proceedings were contemplated, but this case too did not restrict the discretion of the Court.

In *Heath* v. *Heath*[7] the facts were substantially the same, except that the application to dispense with substituted service relied on rules 8 and 10 of the Matrimonial Causes Rules, 1947. Rule 8 (3) provided:

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[1] *Levene* v. *C.I.R.*, [1928] A.C. 217; *C.I.R.* v. *Lysaght*, [1928] A.C. 234; *Re Mackenzie*, [1941] 1 Ch. 69.

[2] *Levene* v. *C.I.R.*, [1928] A.C. 217, 225.

[3] *Forsyth* v. *Forsyth*, [1948] P. 125; *Macrae* v. *Macrae*, [1949] P. 397; *Hamilton* v. *Hamilton*, [1949] W.N. 61.

[4] [1950] 2 All E.R. 404; 66 T.L.R. (Pt. 2) 235; [1950] W.N. 355.

[5] [1943] 1 All E.R. 260, affirmed [1943] P. 49; [1943] 1 All E.R. 384.

[6] [1947] 2 All E.R. 852.

[7] [1950] P. 193; [1950] 1 All E.R. 877; [1950] W.N. 201.

> 'An application for leave to substitute for the modes of service prescribed by the foregoing paragraphs of this rule some other mode of service, or to substitute for service notice of the proceedings or otherwise shall be made *ex parte* by lodging with the Registrar an affidavit setting out the grounds on which the application is made.'[1]

Further, in the opinion of the Court of Appeal the facts established beyond reasonable doubt that the respondent had notice of the petition although it had not been possible to serve it on him. In these circumstances the Court of Appeal reversed the order of Willmer J. refusing to exercise his discretion to dispense with the service on the respondent.

Guardianship of Infants

No. 7. *R.* v. *Sandbach Justices*[2] involved an application for an order of *certiorari* to remove to the High Court to be quashed an order made by the Sandbach Justices awarding, *inter alia*, the custody of a child to the mother. The applicant contended that the justices had no jurisdiction to make the order under the Guardianship of Infants Acts, 1886–1925, seeing that the child resided in Northern Ireland and notwithstanding that both parents resided in England. Lord Goddard C.J., who delivered the judgment of the Court, quoted *Harris* v. *Harris*,[3] where Lord Merriman said:

> 'It is the rarest possible thing for a judge of this Division of the High Court to make a custody order in respect of a child who is out of the jurisdiction.'

In addition, he referred to *McLean* v. *McLean*,[4] decided by the Court of Session, where it was held that a Scottish court had jurisdiction to make orders concerning the custody of a child resident in England whose parents were domiciled in Scotland. As a result, Lord Goddard held that English courts have jurisdiction to make custody orders in similar circumstances, but that this jurisdiction should be used sparingly seeing that its exercise would frequently be undesirable.

English law provides little guidance on this question. Before the passing of the Guardianship of Infants Act, 1925, English courts were inclined at times,[5] although by no means invariably,[6] to recognize guardians appointed by courts of a foreign country where the infant was domiciled, even if the infant resided in England. At the same time they claimed for themselves jurisdiction over infants abroad who were British subjects.[7] The practice of Scottish courts has consistently recognized the jurisdiction of the courts where the parents are domiciled. They have recognized foreign appointments made in these circumstances,[8] although not without exceptions,[9] and they have assumed jurisdiction themselves, although the infant was resident in England or elsewhere,[10] on the ground that the judgment was one *in rem*.

Affiliation Orders

No. 8. For a little more than one hundred years it has been a recognized rule of English law that no affiliation proceedings lie against a father in England, if the illegitimate child was born abroad of a mother domiciled abroad. This principle, established in *Reg.* v. *Blane*,[1] is subject to one exception only. It was laid down in *R.* v. *Humphrys*[2] that proceedings may be initiated in England if the parents are British subjects domiciled in England, notwithstanding that the child was born abroad.

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[1] Compare Latey, *On Divorce* (13th ed. 1945), p. 603.

[2] [1951] 1 K.B. 62; [1950] 2 All E.R. 781; 66 T.L.R. (Pt. 2) 291; [1950] W.N. 397.

[3] [1949] 2 All E.R. 318, at p. 322.

[4] [1947] S.C. 79.

[5] *Stuart* v. *Bute* (1861), 9 H.L.C. 440; *Nugent* v. *Vetzera* (1866), L.R. 2 Eq. 704; *De Savini* v. *Lousada* (1870), 18 W.R. 425; *Monaco* v. *Monaco* (1937), 157 L.T. 231.

[6] *Johnston* v. *Beattie* (1843), 10 Cl. & F. 42, 114.

[7] *Hope* v. *Hope* (1854), 4 De G. M. & G. 328.

[8] *Barkworth* v. *Barkworth*, [1913] S.C. 759; *Radoyevitch* v. *Radoyevitch*, [1930] S.C. 619.

[9] *Westergaardt* v. *Westergaardt*, [1914] S.C. 977.

[10] *Ponder* v. *Ponder*, [1932] S.C. 233; *Kitson* v. *Kitson*, [1945] S.C. 434, [illegible] v. *McLean*, [1947] S.C. 79; see also *Campbell* v. *Campbell*, [1920] S.C. 31, 36; *Low*, [1920] S.C. 351.

In *Tetau* v. *O'Dea*[3] the mother was domiciled and resident in Germany when the child was born. The father was a British subject domiciled in England. Subsequently the mother came to England and applied successfully to a London magistrate for an affiliation order. The respondent appealed to Quarter Sessions, and the order was quashed. Upon a case stated to the King's Bench Division, the appellant contended that *Reg.* v. *Blane* was no longer good law, but the appeal was dismissed. Lord Goddard C.J held—

(1) that *Reg.* v. *Blane*[4] precluded all affiliation proceedings in England in respect of children born out of the country, even if their status as illegitimate children under foreign law was established to the satisfaction of the court;

(2) that *R.* v. *Humphrys*[5] was decided upon the special facts of the case and did not purport to overrule *Reg.* v. *Blane*;[6]

(3) that the effect of the decision in *Reg.* v. *Blane*[7] had not been modified by subsequent legislation in matters of bastardy.[8]

The decision, which follows established authority, brings out clearly the reasons why affiliation proceedings cannot be entertained in England in the circumstances. The negative attitude of English courts is not due to any reluctance to examine the status under foreign law of a bastard born abroad of a mother domiciled out of England, although courts of summary jurisdiction are ill equipped to deal with questions of foreign law. English courts refuse to assume jurisdiction on the ground that English bastardy legislation is exclusively designed to relieve the parish where the child was born of the obligation to maintain it. This emphasis upon the need to relieve the community rather than upon the necessity to strengthen the family tie between the bastard and his father may be regrettable in modern circumstances, and different trends have begun to make themselves felt in the Dominions,[9] but nothing less than legislation can alter the present position in English law.

Contracts

No. 9. The decision of the Court of Appeal in *Boissevain* v. *Weil*[10] was noted in the previous volume of this *Year Book.*[11] In June and July 1944 the defendant, a British subject, resident in Monaco, which was then under German occupation, borrowed £6,000 from the plaintiff, a Dutch subject who was also resident in Monaco. The loan was to carry 5 per cent. interest from 9 June 1945. The defendant promised to repay the loan in pounds sterling after the end of the war, or at any earlier date, if her account in England should be released sooner. She gave the plaintiff three cheques for £2,000 each which were blank as to date, blank as to the payee, and uncrossed, and purported to inform both her bank in England and her English solicitors of the transactions. It appears that the defendant had no account at the bank indicated by her. Upon the failure of the defendant to repay the loan, the plaintiff sued her in England. Croom-Johnson J. gave judgment for the plaintiff on the ground that the contract was governed by Monegasque law, that it was not illegal at common law as involving trading with the enemy, and was not prohibited by the Trading with the Enemy Act, 1939, or by the Emergency Powers (Defence) Act or the Regulations issued thereunder. In the Court of Appeal[13] both

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[1] (1849), 13 Q.B. 769.

[2] [1914] 3 K.B. 1237.

[3] [1951] K.B. 184; [1950] 2 All E.R. 695; 66 T.L.R. (Pt. 2) 339.

[4] (1849), 13 Q.B. 769.

[5] [1914] 3 K.B. 1237.

[6] (1849), 13 Q.B. 769.

[7] Ibid.

[8] The Bastardy Laws Amendment Act, 1872.

[9] *Munro* v. *Leedham*, [1925] 2 D.L.R. 604.

[10] [1949] 1 K.B. 482; [1949] 1 All E.R. 146.

[11] 26 ([illegible]9), pp. 481–3.

[illegible]48] 1 All E.R. 893; 64 T.L.R. 293; [1948] W.N. 181.

[13] [1949] 1 K.B. 482; [1949] 1 All E.R. 146.

Tucker and Denning L.JJ. held that the transactions were invalid, seeing that the Defence Regulations which prohibited them applied to all British subjects, wherever resident. Tucker L.J. attached some importance to the fact that the contract was to be performed in England, while Denning L.J. was influenced, to a certain extent, by the circumstance that, in his view, the contract was governed by English law. They agreed that no quasi-contractual claim for money had and received could be brought, on the ground, it would appear, that English law, and thus also the Defence Regulations, applied to the quasi-contractual claim.

Regulation 2 of the Defence (Finance) Regulations, 1939 (as amended in 1940), provided:

> 'Except with permission granted by or on behalf of the Treasury, no person other than an authorised dealer shall . . . buy or borrow any foreign currency, or any gold from, or lend or sell any foreign currency or any gold to, any person not being an authorised dealer.'

Section 3 (1) (*b*) of the Emergency Powers (Defence) Act, 1939, provided:

> 'Unless the contrary intention appears therefrom, any provisions contained in, or having effect under, any Defence Regulation shall . . . (*b*) in so far as they impose prohibitions, restrictions or obligations on persons apply (subject to the preceding provisions of this subsection) to all persons in the United Kingdom and all persons on board any British ship or aircraft, not being a Dominion ship or aircraft, and to all other persons being British subjects except persons in any of the following countries or territories, that is to say, (i) a Dominion, (ii) India, Burma and Southern Rhodesia, (iii) any country or territory to which any provisions of this Act can be extended by Order in Council, and (iv) any other country or territory . . . under His Majesty's protection or suzerainty.'

Upon further appeal the House of Lords upheld the decision of the Court of Appeal.[1] Lord Radcliffe, with whom the other members of the House agreed, held that Regulation 2 of the Defence (Finance) Regulations, 1939, applied without restrictions of a territorial, personal, or material kind. No exceptions could be implied, even in respect of British subjects in enemy-occupied territory. Nor were the regulations confined to transactions which were governed by English law. In so far as a claim for money had and received was concerned, his Lordship relied on the statement of Lord Sumner in *Sinclair* v. *Brougham*[2] where he said:

> 'The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid.'

However undesirable in its result, which probably could not be overcome in the circumstances by framing the action in tort, there can be no doubt that the decision is in accordance with principle. It is only to be regretted that the House of Lords preferred to rest its conclusions on the narrow principle of statutory interpretation rather than on the broader notions of private international law to the effect that the statute applied because English law applied either as the proper law of the contract or as the *lex loci solutionis*. This observation applies with even stronger force to the rejection of the claim for money had and received. If the principle is that a quasi-contractual claim arising out of a contract is determined by the proper law of that contract,[3] and if it is true, as the Court of Appeal thought, that the contract was governed by English law, then English law applied to the claim for money had and received. Thus the application of the rule in *Sinclair* v. *Brougham*[4] obtains its justification in the operation of the ordinary principles of private international law.[5]

[1] [1950] A.C. 327; [1950] 1 All E.R. 728; [1950] W.N. 171.

[2] [1914] A.C. 398, at p. 452.

[3] Dicey, *Conflict of Laws* (6th ed. 1949), Rule 167, pp. 754–7.

[4] [1914] A.C. 398.

[5] For comments see *International Law Quarterly*, 3 (1950), pp. 408–9; *Canadian Bar Review*, 28 (1950), pp. 1022–3; *Law Times Journal*, 209 (1950), pp. 326–7.

Bankruptcy and Winding-up of Companies

No. 10. (I). The decision of the Court of Appeal in *In re a Debtor* (No. 335 of 1947),[1] noted in a previous issue of this *Year Book*,[2] which attempted to define the jurisdiction in bankruptcy of English courts under Section 1 (1) (*d*) of the Bankruptcy Act, 1914, was upheld upon appeal by the House of Lords in *Theophile* v. *Solicitor General*.[3]

The appellant, a Roumanian citizen, who had a place of residence in England where he carried on a business, appealed against assessments in respect of unpaid excess profits tax. On the day when the assessments were confirmed he left England for Eire and did not return. He sent his wife a power of attorney, in exercise of which she sold the business. The Crown obtained an order giving leave to serve a bankruptcy petition out of the jurisdiction in accordance with Rule 158 of the Bankruptcy Rules, 1915. This order was discharged by the Registrar on the ground that leave to serve out of the jurisdiction could not be granted seeing that the debtor was a foreigner residing abroad and therefore not subject to the jurisdiction of the bankruptcy laws. The Court of Appeal reversed this decision and held that there was jurisdiction. The House of Lords upheld the decision of the Court of Appeal.

Section 1 (1) of the Bankruptcy Act, 1914, provided:

> 'A debtor commits an act of bankruptcy . . . (*d*) if with intent to defeat or delay his creditors he . . . departs out of England, or being out of England remains out of England. . . .'

By the relevant subsection (*c*) of Section 1 (2) the term 'debtor' includes

> 'any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him . . . (*c*) was carrying on business in England, personally, or by means of an agent or manager'.

The petition did not rely on the first part of Section 1 (1) (*d*), viz. that the debtor had departed out of England to defeat or delay his creditors, for this ground was excluded by Section 4 (1) (*c*) in view of the delay in the presentation of the petition.

The judgment of Lord Porter, with whom the other members of the House agreed, relied substantially on the arguments which had been put forward by the Court of Appeal. His Lordship reviewed the history of the relevant provisions of the Bankruptcy Act, 1914, and discussed the leading cases bearing on the question before him.[4] He held that

(1) in view of Section 1 (2) the Bankruptcy Act applied to aliens;

(2) as a result of the combined operation of Section 1 (1) (*d*) and Section 1 (2) (*c*) an act of bankruptcy had been committed which attracted the jurisdiction in bankruptcy of English courts;

(3) the reference to carrying on business in the definition of a debtor in Section 1 (2) (*c*) must be interpreted in the light of the corresponding reference to married women in Section 125[5] and of the cases which led to the insertion of the latter provision.[6] Consequently the appellant, having unpaid debts in England, was to be deemed to be still carrying on business there;

(4) it was irrelevant whether *Re Debtors* (No. 836 of 1935)[7] which required that the

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[1] [1948] 2 All E.R. 533; 64 T.L.R. 446.

[2] 25 (1948), pp. 423-4.

[3] [1950] A.C. 186; [1950] 1 All E.R. 405; 66 T.L.R. (Pt. 1) 441; [1950] W.N. 98; 94 S.J. 208.

[4] *Ex p. Crispin, Re Crispin* (1873), 2 Ch. App. 374; *Ex p. Blain, Re Sawers* (1879), 12 Ch. D. 522; *Re Pearson, Ex p. Pearson*, [1892] 2 Q.B. 263; *Cooke* v. *Charles A. Vogeler Co.*, [1901] A.C. 102; *Re Debtors* (No. 836 of 1935), [1936] Ch. 622.

[5] See also Married Women's Property Act, 1882, s. 1 (5); Bankruptcy and Deeds of Arrangement Act, 1913, s. 12 (1).

[6] *Re Dagnall*, [1896] 2 Q.B. 407; *Re Worsley*, [1901] 1 Q.B. 309; *Re Clark*, [1914] 3 K.B. 1095; *Re Reynolds*, [1915] 2 K.B. 186; *Re Allen*, [1915] 1 K.B. 285.

[7] [1936] Ch. 622.

> act of bankruptcy must operate in England, was rightly decided, since that decision was concerned with the interpretation of Section 1 (1) (*a*).

Upon an analysis of the history of bankruptcy legislation and of the previous authorities, it is possible to disagree with the reasons given by the Court of Appeal and the House of Lords, as has been shown elsewhere.[1] Here the following indications must suffice.

(*a*) Originally the presence of the debtor in England was necessary to obtain a commission of bankruptcy, which followed arrest and imprisonment for two months. By departing the realm or by remaining abroad, when he would have normally returned, the debtor deprived his creditors of the most effective means of making him bankrupt. This consideration inspired the rule in Section 1 (1) (*d*).[2]

(*b*) Today, when it is possible to issue a debtor's summons,[3] to serve a bankruptcy notice abroad,[4] or to serve a writ abroad,[5] or to sue the debtor at his new residence abroad,[6] there is less reason to extend the application of Section 1 (1) (*d*) which was in fact interpreted restrictively to cover only such cases where the debtor had left England for his residence abroad, but had broken his journey and could not be traced.[7]

(*c*) It is inadmissible to read Section 1 (1) (*d*) and Section 1 (2) (*c*) in combination. The latter provision defined the sphere of operation of the English Bankruptcy Act by reference to jurisdiction over the person of the debtor. It brought the jurisdiction over British subjects into line with that exercised over foreigners. It did not purport to establish to what extent acts of bankruptcy committed abroad are acts of bankruptcy in England. This task was fulfilled by the courts with the help of special rules of the conflict of laws.

(*d*) It is equally inadmissible to read Section 1 (2) (*c*) in the light of Section 125[8] and of the cases which led to its formulation. The former is concerned with international, the latter with domestic jurisdiction. But even if the contrary were correct, it cannot be assumed that as a result of the combined operation of these sections the debtor must be deemed to be carrying on business personally or by means of an agent or manager, as required by Section 1 (2) (*c*).

If these conclusions lead to an unsatisfactory result, inasmuch as it follows that prima facie English courts have no jurisdiction, this is due, in part, to the failure of the Crown to act in time so as to attract the operation of the other limb of Section 1 (1) (*d*), i.e. that the debtor departed out of England to delay or defeat his creditors. In part it is due to the nature of the claim which, being a claim for taxes, cannot be enforced abroad by the normal process of action.

(II). No new problems presented themselves to the Court of Appeal in *Re Cohen (A Bankrupt), Ex parte The Bankrupt* v. *Inland Revenue Commissioners and Another*[9] where in substantially similar circumstances an application was made by the Crown on the ground that the debtor had departed out of England with intent to defeat or delay his creditors. Regarding the question to what extent Section 1 (1) (*d*) can be made to apply to foreigners who return to their home country, the Master of the Rolls examined *Ex p. Brandon, Re Trench*[10] and *Ex p. Goater, Re Finney*[11] and said:

'Though it may be true . . . that the mere fact, without more, that a foreigner happens to have left England and has gone home abroad is not sufficient to raise the inference

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[1] (1949), 12 *Modern Law Review*, 454–76.

[2] *Williams* v. *Nunn* (1809), 1 Taunt. 270; *Windham* v. *Paterson* (1815), 1 Stark. 144; 2 Rose 466; *Warner* v. *Barber* (1816), Holt N.P. 175 and the case cited in (1949), 12 *Modern Law Review* at p. 464, n. 51.

[3] S. 1 (1) (*g*) of the Bankruptcy Act, 1914.

[4] Bankruptcy Rules 1915, rule 158.

[5] R.S.C. Order XI.

[6] *Ex p. Brandon, re Trench* (1884), 25 Ch. D. 500 (C.A.).

[7] *Ex p. Langworthy, re Langworthy* (1885), 3 T.L.R. 544.

[8] Repealed by the Law Reform (Married Women and Tortfeasors) Act, 1935, Second Schedule.

[9] [1950] 2 All E.R. 36; 66 T.L.R. (Pt. 1) 1207; [1950] W.N. 266.

[10] (1884), 25 Ch. D. 500.

[11] (1874), 30 L.T. 620.

[*i.e.* that he departed this realm with intent to defeat or delay his creditors], in few cases are the facts ever likely to be confined to that one single circumstance.'

The Court found sufficient grounds for making the inference seeing that the debtor had left England when he was in embarrassed circumstances and had made it difficult to trace him at his home abroad. Consequently, the Court held that an act of bankruptcy in the meaning of Section 1 (1) (*d*) had been committed.

No. 11. It has been recognized over a period of years that English courts have no jurisdiction to wind up an unregistered foreign company which, though carrying on business in England, has no place of business in England.[1] This principle was challenged expressly by Harman J. in *Banque des Marchands de Moscou* (*Koupetchesky*) (*In liquidation*) v. *Kindersley*,[2] and *obiter* by the Court of Appeal.[3]

The plaintiff was the liquidator of the Banque des Marchands de Moscou, a Russian company, which had been dissolved by a decree of the Soviet Government and which was being wound up in England, where it had transacted business through an agent, and where it had large assets. The English winding-up order was made in 1932 notwithstanding that the company had no fixed place of business in England. In 1943 the defendant sought to prove in the liquidation against the bank. In 1949 the liquidator issued a writ against the defendant claiming moneys alleged to be due to the bank. In the course of the subsequent proceedings the defendant issued a summons for an order dismissing or staying the action by the plaintiff liquidator or to have the name of the bank struck out on the ground that the bank had not been in existence at any relevant time and was wrongly wound up in England, where it had never had a place of business or carried on business, except through agents.

Harman J. held that the bank was properly being wound up in England, even if it had no place of business, but only assets, in England. *Re Tovarishestvo Manufactur Liudvig-Rabenek*[4] did not, in his opinion, rule out this conclusion. *De Dendre Valley Railway & Canal Co.*[5] and *Re Union Bank of Calcutta*[6] supported it. *Re Lloyd Generale Italiano*[7] could be reconciled. In the Court of Appeal Sir R. Evershed M.R. found that even if the bank had no specific place of business in England, the fact that one of its agents had transacted business for the bank in England showed that the bank had a place of business in England in the extended meaning given to this term by Cohen J. in the *Rabenek* case. By way of observations made *obiter* the Master of the Rolls rejected as artificial the findings in the *Rabenek* case that for the purpose of winding-up an occasional stay at the same hotel in England by a representative of the company visiting England was sufficient to establish the requisite place of business. In his opinion neither Section 338 (1) (*d*) nor Section 338 (2) of the Companies Act, 1929,[8] required a specific place of business in England for the purpose of winding-up. In the former provision the requirement of a place of business in England was merely one of several alternative conditions. In the latter provision the requirement was merely expository.

It is not easy to accept these conclusions.

1. The cases in which English courts assumed jurisdiction to wind up foreign companies arose before the passing of the Companies Act, 1862, and involved unlimited companies, some of whose shareholders resided in England.[9]

2. When English unregistered companies became subject to the procedure of winding-up in virtue of Section 199 of the Companies Act, 1862, if they had a place of business

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[1] Dicey, *Conflict of Laws* (6th ed. 1949), Rule 46 (2), p. 291; Rule 47 (3), p. 293.

[2] [1950] 1 All E.R. 105; 66 T.L.R. (Pt. 1) 1147.

[3] [1951] Ch. 112; [1950] 2 All E.R. 549; [1950] W.N. 410.

[4] [1944] Ch. 404.

[5] (1850), 19 L.J. Ch. 474.

[6] (1850), 19 L.J. Ch. 338.

[7] (1885), 29 Ch. D. 219.

[8] Now Companies Act, 1948, ss. 399 (5), 400.

[9] *Re Dendre Valley Ry. & Canal Co.* (1850). 19 L.J. Ch. 474; *Re Union Bank of Calcutta* (1850), 19 L.J. 338; *Re Madrid and Valencia Ry. Co.* (1849), 3 De G.M. & Sm. 127.

in England, foreign companies became subject to the same procedure, seeing that they were equated to English unlimited companies.[1]

3. So far as foreign unregistered companies were concerned English winding-up proceedings were purely ancillary[2] and discretionary. This discretion was only exercised if assets were available in England.[3]

4. Section 199 (1) of the Companies Act, 1862, which is reproduced in Section 338 (1) (*b*) of the Companies Act, 1929,[4] introduced a jurisdictional provision to the effect that an unregistered company was attributed a notional place of registration in England for the purpose of winding-up. This was to be its principal place of business. Without such a place of business no winding-up proceedings can be instituted in England.

5. The material conditions for winding-up were contained in Section 199 (3) of the Act of 1862, which is identical with Section 338 (1) (*d*) of the Act of 1929.[5] A foreign unregistered company may be wound up, *inter alia*, if it has ceased to carry on business in England or is carrying on business only for the purpose of winding up its affairs. This condition is one of several alternative conditions for instituting winding-up proceedings in England.

6. In view of Section 338 (1) (*b*)[6] it is irrelevant whether Section 338 (2)[7] is purely expository, but the history of Section 338 (1) (*b*) suggests that Section 338 (2), as originally inserted in the Companies Act, 1928, was designed to preserve and confirm the established jurisdictional provisions.

7. Nevertheless, the views expressed by Harman J. and by the Master of the Rolls deserve approval where foreign companies are concerned which have been dissolved abroad by a confiscatory measure and which have assets in England, for no other process is available to prevent such assets from becoming frozen in perpetuity.[8] It is difficult, however, to reconcile this solution with the express provisions of the Companies Act.

No. 12. Conflicting claims to assets in England owned by a foreign company may arise if an English creditor and the liquidator in the foreign winding-up of the company each allege priority in the assets which were seized by way of execution on behalf of the creditor before the winding-up abroad had become known, and before an ancillary winding-up order had been made in England. If the order of priority differs, seeing that in the view of foreign law the seizure followed the presentation of the petition for a winding-up order and was void, while according to English law the winding-up followed the seizure and was valid, a nice question of classification arises. If Section 325 of the Companies Act, 1948, which regulates the priorities between execution creditors and the liquidator, involves a question of substance, English law is inapplicable; if it involves a question of procedure, foreign law, which provides a different order of priorities, is inapplicable.

In *Re Suidair International Airways Ltd.* (*In liquidation*),[9] Wynn-Parry J. followed *Re English, Scottish & Australian Chartered Bank*[10] and held that the regulation of priorities contained in Section 325 of the Companies Act, 1948, involved a question of procedure. Consequently the creditor in England was entitled to retain against the foreign liquidator the benefit of the writs of *fieri facias*.

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[1] *Re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

[2] *Re Matheson Brothers Ltd.* (1884), 27 Ch. D. 225, at pp. 228, 229.

[3] *Re Matheson Brothers Ltd.*, *supra; Re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; *Re Mercantile Bank of Australia*, [1892] 2 Ch. 204, 208.

[4] Now s. 399 (3) of the Companies Act, 1948.

[5] Now s. 399 (5) of the Act of 1948.

[6] Now s. 399 (3) of the Act of 1948.

[7] Now s. 400 of the Act of 1948.

[8] Compare Companies Act, 1948, s. 354.

[9] [1951] Ch. 165; [1950] 2 All E.R. 920; 66 T.L.R. (Pt. 2) 909; [1950] W.N. 513.

[10] [1893] 3 Ch. 385, 394.

Jurisdiction—Assumed Jurisdiction under Order XI

No. 13. Three questions connected with service of writs out of the jurisdiction were discussed by the Court of Appeal in *International Corporation Ltd.* v. *Besser Manufacturing Co.*[1] The first was of a general nature, inasmuch as it was alleged that the procedure under R.S.C., Order XI, did not apply to actions for an account. The second and third involved the interpretation of Order XI, rule 1 (*e*).

In 1941 the plaintiffs, an English company, had made in the United States an agreement with the defendants, an American company, whereby the former were to act as the sole agents of the latter in Europe and were to receive a commission of 15 per cent. on the sale in England or on the continent of Europe of certain products of the defendants.

In 1949 the plaintiffs brought an action against the defendants claiming an account of all sales made by the defendants to purchasers in Europe between 1941 and payment of commission on such sales.

The plaintiffs applied for leave to serve notice of the writ out of the jurisdiction under Order XI, rule 1 (*e*), which provided:

> 'Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever . . . (*e*) the action . . . is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction.'

The plaintiffs submitted an affidavit in support of their application, the relevant parts of which were not free from contradiction and obscurity. Thus in paragraph 4 they stated that commission was payable on all sales in Europe, while in paragraph 3 they stated that such commission was only due in respect of sales effected by the plaintiffs. In paragraph 5 they asserted that by the terms of the contract payment of the commission was to be made in England, while in fact this assertion followed only by implication from the rule of English and American law that the debtor must seek out the creditor.

The Master gave leave to serve notice of the writ out of the jurisdiction, but Lynskey J. reversed the Order. The Court of Appeal restored the order of the Master. Tucker L.J., with whom the other members of the Court of Appeal agreed, held:

1. that an order for service out of the jurisdiction could be made in the exercise of the discretion vested in the court in virtue of Order XI, rule 4, notwithstanding that the claim was for an account. In support of this principle he relied on *Hoerler* v. *Hanover Caoutchouc, Gutta Percha and Telegraph Works*;[2]
2. that the plaintiffs had made out a prima facie case. Inconsistencies and discrepancies in the affidavit did not contravene the requirement that there must be fullest disclosure, as laid down in *Re Schintz*[3] and other cases;[4]
3. that no more than a prima facie case had to be made out by the plaintiffs, seeing that upon an application to serve notice of a writ out of the jurisdiction, the court was not required to try out an issue.

No. 14. The requirements which must be satisfied before leave to serve notice of a writ out of the jurisdiction can be given in virtue of Order XI, rule 1 (*e*), in conjunction with rule 4, were carefully examined by the Court of Appeal in *Korner* v. *Witkowitzer Bergbau und Eisenhütten Gewerkschaft*.[5] Nevertheless the *ratio decidendi* of the case is not easy to discern, seeing that the two Lords Justices of Appeal (Tucker and Singleton L.JJ.) who gave the majority judgment differed on the question of law, while Denning L.J., who delivered a dissenting opinion, disagreed with Bucknill L.J. on the question of law and with Singleton L.J. on the question of fact.

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[1] [1950] 1 All E.R. 355; 66 T.L.R. (Pt. 1) 369; [1950] W.N. 86; 94 S.J. 178.

[2] (1893), 10 T.L.R. 103.

[3] [1926] Ch. 710, 717.

[4] *The Hagen*, [1908] P. 189, 201; *Société Générale de Paris* v. *Dreyfus Bros.* (1887), 37 Ch. D. 215.

[5] [1950] 2 K.B. 128; [1950] 1 All E.R. 558; [1950] W.N. 107.

The plaintiff applied for leave to serve notice of a writ out of the jurisdiction in virtue of Order XI, rule 1 (*e*).[1] He claimed sums of money alleged to be due to him, first, under a pension agreement and, secondly, under a service agreement. From the affidavits of the parties it appeared that the plaintiff, while in the employment of the defendants in Czechoslovakia, had made an agreement with the latter on 18 January 1929 whereby his pension was to be calculated according to the gold value of the Czech crown in 1929, in case serious fluctuations should occur. In 1938, when the plaintiff was about to retire and intimated his intention to live abroad, a further agreement was concluded on 25 March 1938 whereby the plaintiff was to advise the defendants in certain matters and was to be available for a period of thirty days each year in consideration of an annual fee. For this purpose the plaintiff was to reside in Zürich, Paris, or London. The plaintiff retired in March 1938, and thus became entitled to the pension. From May 1938 he became entitled to salary as a consultant. Upon the production by the defendants of a letter written by the plaintiff on 23 November 1938 which contained the following passage: 'The gold clause was requested with the express argumentation that I am going to oversea', he swore a second affidavit. In this he stated that the letter had brought to his mind details of a conversation in January 1929 with the general manager of the defendants which led to the agreement of 18 January 1929. In view of the plaintiff's desire to live abroad it was there agreed that the plaintiff was to receive payment of his pension in whatever country he might be living at the time when it accrued. The insertion of the gold value clause in the agreement of 18 January 1929 was the outward result of this understanding.

Since the plaintiff was indebted to the defendants, no payments were made to him abroad after his retirement until the debt had been paid off in 1940, when the war made further payments abroad impossible. The Master allowed an application by the defendants to set aside an order to serve notice of the writ out of the jurisdiction. An appeal by the plaintiff was dismissed by Slade J. on the ground that so far as Order XI, rule 1 (*e*), was concerned, the plaintiff was only required to make out a prima facie case in respect of the formation of the contract and the fact of its breach, but that the plaintiff was bound to satisfy the Court that the breach had been committed in England. The Court of Appeal reversed the decision of Slade J.

1. Bucknill L.J.[2] held that the standard of proof required under Order XI, rule 1 (*e*), was uniform. He said:

> 'On principle I do not see why there should be a different standard of proof on the issue whether the act or omission on which the jurisdiction is alleged to be based occurred within the jurisdiction from the standard of proof required of the act or omission of the defendants which is alleged to give rise to their liability to the plaintiff. It may well be that the same set of facts will be relied on, both to found liability and to found jurisdiction. . . .'

He distinguished *Fowler* v. *Barstow*[3] and *Malik* v. *Narodni Banka Czeskoslovenska*[4] on the ground that in the former case the allegations of the plaintiff had been refuted by the defendant while in the latter case the affidavit of the plaintiff did not allege any breach within the jurisdiction. In his opinion the observations to the contrary made by Lord Goddard C.J. in *Malik*'s case were purely *obiter. Thomas* v. *Dowager Duchess of Hamilton*,[5] *Chemische Fabrik vormals Sandoz* v. *Badische Anilin und Soda Fabrik*,[6] and *Tyne Improve-*

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[1] For the text of this rule see above, p. 479.

[2] [1950] 1 All E.R. 558, at p. 562.

[3] (1881), 20 Ch. D. 240.

[4] [1946] 2 All E.R. 663, at p. 664; 176 L.T. 136.

[5] (1886), 17 Q.B.D. 592.

[6] (1904), 90 L.T. 733.

ment Commissioners v. *Armement Anversois S.A.*, *The Brabo*,[1] supported his own interpretation. In his view the plaintiff had made out a prima facie case.

Singleton L.J. agreed with the decision of Slade J. to the effect that the plaintiff had to satisfy the court that a breach of the contract had been committed within the jurisdiction[2] and referred to *Malik*'s case,[3] *Comber* v. *Leyland*,[4] and *Hemelryck* v. *William Lyall Shipbuilding Co.*[5] However, in his opinion, the plaintiff had satisfied this stringent requirement.

Denning L.J. agreed with Singleton L.J. on the question of law, and held that the statement of Lord Goddard C.J. in *Malik*'s case[6] was part of the *ratio decidendi*. He distinguished *The Brabo*[7] on the ground that it concerned the application of Order XI, rule 1 (*g*). On the other hand, he was not satisfied that the plaintiff had made out that a breach had been committed within the jurisdiction. Moreover, English law governed all questions of evidence, and under English law evidence intended to add a term to a written contract was inadmissible.

2. As regards the service contract, Bucknill L.J. was prepared to follow the practice initiated in *Thomas* v. *Dowager Duchess of Hamilton*[8] and to give leave to serve a notice of the writ abroad in the following form:

> 'leave is limited to the extent that the plaintiff undertakes that, if it appears that his claim under the service agreement was not payable within the jurisdiction, he is not to obtain judgment on that head of claim.'

Singleton and Denning L.JJ. were ready to agree with this wording of the order, although the former was inclined to regard it as too cautious while the latter thought it unnecessary, having regard to his decision that leave should be refused.

3. Both Bucknill and Singleton L.JJ. held that England was the *forum conveniens*, seeing that it would be easier for the defendants to get their witnesses to England than for the plaintiff to attend a trial in Czechoslovakia.

In view of the fact that Denning L.J., who gave a dissenting judgment, agreed with the principle of interpretation of Order XI, rule 1 (*e*), given by Singleton L.J., who formed part of the majority and who appears to have disagreed with Bucknill L.J., who gave the other majority decision, it is difficult to formulate the true *ratio decidendi*.

(*a*) It is difficult to see how strict proof of a breach within the jurisdiction can be required, if the claim itself must remain purely hypothetical, seeing that in proceedings under Order XI the plaintiff is only required to make out a prima facie case. At the most this requirement can mean only, first, that the plaintiff must state expressly in his affidavit the fact that and the reasons why the contract must be regarded as broken within the jurisdiction and, secondly, that the defendant must not have opposed this contention, even if he should have contested the validity of the claim as such. In so far as the requirement of strict proof is borne out by the cases it must be remembered that they are based upon an older version of Order XI, rule 1 (*e*), which provided that the action must be founded

> 'on any breach or alleged breach within the jurisdiction of any contract wherever made which, according to the terms thereof, ought to be performed within the jurisdiction. . . .'

(*b*) Conditional leave, limited to the amount which may be recovered in respect of moneys payable within the jurisdiction, is a useful device, especially where Order XI, rule 1 (*e*), is concerned. This rule differs from all others inasmuch as jurisdiction can be assumed by English courts in respect of the entire subject-matter of a foreign contract, even if only a small and consequential breach has occurred in England. The attempt to sever the claim in respect of the breach committed in England and to restrict the leave to serve notice of the writ out of the jurisdiction to the specific breach in England, strikes a just balance between the interests of the plaintiff in England and the defendant abroad.

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[1] [1949] A.C. 326.

[2] [1950] 1 All E.R. at p. 571.

[3] [1946] 2 All E.R. 663.

[4] [1898] A.C. 524.

[5] [1921] 1 A.C. 698, 702.

[6] [1946] 2 All E.R. 663.

[7] [1949] A.C. 326.

[8] (1886), 17 Q.B.D. 592.

Jurisdiction to Stay Actions

No. 15. Motions to stay proceedings arise infrequently and are seldom successful. *The Hartlepool,*[1] however, is an exception. The plaintiffs were the owners of the Italian steamship *Sirena,* which had been involved in a collision in French North African waters with the *Hartlepool,* which was owned by the defendants. The plaintiffs began proceedings *in personam* against the defendants in the Commercial Court of Bona in French North Africa, and the defendants filed a counterclaim. Shortly afterwards the plaintiffs started proceedings *in rem* against the defendants in England. The defendants thereupon moved to stay the proceedings in England or to set aside the writ in the action in England. Willmer J. distinguished *The Christiansborg,*[2] where in similar circumstances the Court of Appeal, by a majority, had stayed the action in England, seeing that in *The Christiansborg*[3] the proceedings abroad and in England were both *in rem,* while in the present case the proceedings in North Africa were *in personam* and the proceedings in England were *in rem.* In these circumstances, in view of the three alternatives set out by Baggallay L.J. in *The Christiansborg,*[4] either to put the plaintiff to his election, or, without allowing him to elect, to stay all proceedings in England, or to restrain the plaintiff from prosecuting the proceedings abroad, Willmer J. expressed preference for the third alternative and granted an injunction restraining the plaintiffs from further proceedings in French North Africa.

K. LIPSTEIN

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[1] (1950), 84 Ll.L.R. 145.

[2] (1885), 10 P.D. 141.

[3] Ibid.

[4] Ibid., at p. 152.

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours. Vols. 74 and 75. Paris: Recueil Sirey. 1949. 772 pp. and 704 pp.

These two volumes contain fifteen courses of lectures delivered at the Academy of International Law at The Hague in 1949. The first question which presents itself to the reader in approaching them relates to the extent to which lectures can be successfully reproduced in print. This is more than a question of phraseology—although it would have been desirable if odd colloquialisms (e.g. at p. 691 in vol. 74) had been altered before the work was sent for printing. Nor is it merely a question of the importance of the lecturer's personality. From that point of view, indeed, the majority of the courses —hampered as their authors were by the necessity of delivering them in a foreign language—are more impressive in print. The problem is one of substance: are the requirements for a satisfactory course of lectures the same as those for a printed scientific work? The first course printed in these volumes, M. André Siegfried's lectures on 'Les Canaux internationaux et les grandes routes maritimes mondiales', raises some doubts on this score. These lectures were vivid and stimulating when spoken, and provided a valuable outline of the subject, although even then the lack of emphasis on the legal aspects of the subject was to be regretted. In print they seem too cursory and superficial even for an historical survey. However, the succeeding courses fully vindicate the policy of publishing the Academy lectures in this form. Indeed, the *Recueil* is unique in that it provides a medium for scientific works which exceed the scope of an article but which are too slight for publication as a monograph.

A second question on which the publication of these volumes invites speculation relates to the planning of the annual courses. The *Recueil* is not an ordinary periodical publication intended to print contributions on any and every topic of international law. It represents a cohesive programme of study. Is it, then, desirable, that the courses in any one year should be, as far as possible, interrelated, or, on the contrary, should the aim be to make the programme as varied as circumstances permit? An argument for the latter course is provided by the fact that the lectures are intended to provide extensive as well as intensive instruction in international law. An argument for the former lies in the deeper understanding often gained by the study of several similar or related topics. Caution probably dictates a combination of both methods. This would, indeed, appear to be the policy of the Academy.

The first of the two volumes for 1949 has a certain unity in that all the courses, with the exception of M. Siegfried's, are concerned in some way with the place of international law in relation to other systems of law. Professor Arminjon's comparative study of 'Les Systèmes juridiques complexes et les conflits de loi et de juridiction auxquels ils donnent lieu' and Professor Cowles's lectures on 'International Law as applied between Subdivisions of Federations', with particular reference to the United States, are directly complementary. They demonstrate that the rules of private international law and of public international law, which are usually conceived as applicable only to the relations of independent states, are applied with very slight modifications to the relations between autonomous systems of law and autonomous regions within the State. Conversely, Professor Bodenhausen's course on 'Problèmes actuels du droit international de la propriété industrielle, littéraire et artistique' is concerned with the international aspects of private law. Professor Makarov, in 'Règles générales du droit de la nationalité', shows, comprehensively and lucidly, the interrelation of international law and national law in the solution of problems of nationality. In a different sphere Professor Balladore-Pallieri, in his scholarly treatment of 'La Formation des traités dans la pratique internationale contemporaine', deals with the influence of national law regarding the treaty-making power on the international validity of treaties. Professor Preuss, in a stimulating discussion of 'Article 2, par. 7, of the Charter of the United Nations and Matters of Domestic Jurisdiction' strives to define the limits of the authority of international law. Last—but by no means least—Professor Guggenheim, in examining 'La Validité et la nullité des actes juridiques internationaux', discusses the applicability to international law of general jurisprudential notions regarding the relation between illegality and nullity. All these courses bear clear marks of distinction.

The fare provided by the second volume is more varied. Professor Milliot's course on 'La Conception de l'État et de l'ordre légal dans l'Islam' was to be paralleled by a similar course on China, but circumstances prevented this. Even standing alone, Professor Milliot's lectures provide a valuable reminder that international law cannot be shaped according to Western concepts of law alone. Professor Komarnicki contributes a critical review of attempts, from the League of Nations to the United Nations, to define aggression. Dr. Dollot, in a course entitled 'Le Droit international des espaces polaires', deals comprehensively with territorial claims in the Arctic and Antarctic. Professor de Vries provides a lucid and authoritative survey of 'Recent Developments of International Private Law in the United States'. Professor Monaco, in a course entitled 'Les Conventions entre belligérants', provides a scholarly examination of a problem brought into prominence by the Second World War. Professor Balogh's treatment of 'World Peace and the Problem of Refugees' is mainly factual; more legal analysis would have enhanced its value. Finally, Mr. Jennings contributes a course modestly entitled 'Some Aspects of International Air Law' which, by its clarity, should help to convince the reader that the law of the air 'deserves the attention of all students of public international law' and not of the specialist alone.

Courses are now published both in French and in English—a welcome development since 1947. Unfortunately the English courses show signs of having been inadequately revised in proof; Professor Balogh's course, in particular, contains a very large number of errors. But this is a very minor criticism of a publication which, in every other respect, maintains the very high standard of excellence set by the previous volumes.

F. MORGENSTERN

Scienza Giuridica e Diritto Internazionale. By ROBERTO AGO. Studi di Diritto Internazionale diretti da Roberto Ago e Giorgio Balladore Pallieri. Vol. 14. Milan: A. Guiffré. 1950. 108 pp. Lire 440.

The object of this book is a critical examination of past and present doctrines concerning the sources and the binding force of international law. Starting from the proposition that lawyers have failed to envisage the international community as a system of co-ordination, not of subordination, the author contends that they have been misled to search for the basis of international law rather than for its existence. The book falls therefore naturally into two parts. The first part is devoted to a discussion of the doctrines of authors from Grotius until the present day. The second part is taken up by an exposition of the author's own views.

He notes, at the outset, that the sources and the binding force of international law first presented a serious problem for Hobbes, seeing that he denied the social nature of man. However, the problem assumed major importance only in the nineteenth century, after the decline of the historical school, when the strictly positivist school came to identify law with rules created by externally visible factors. Then positive law came to be regarded as the command of the legislature, and consequently all rules of conduct had to conform to the criterion of positive law, if they were to be regarded as law. Common consent as a source is only a sociological version of the command theory. The author proceeds to examine the various theories put forward during the last century to reconcile the existence and binding force of international law with the positivist approach to law as a whole, and finds them all artificial. He reviews with much critical insight the principal theories of the Italian and German schools and refutes at some length the theory of *Vereinbarung* first suggested by Triepel. In conclusion, the author suggests that the fundamental mistake of the positivist school is to treat all law as the product of the same factors and to deny the character of law to all rules of conduct which come into being by other processes. This mistake engendered another, i.e. the need to find an acceptable source.

On the other hand, the author finds little to commend in the teaching of those who adhere to the pure theory of law, for this theory, too, equates law with positive law although, in the end, all law becomes hypothetical. Its merit consists in the realization that the question of the basis and binding force of law is not restricted to international law, but presents itself in municipal law as well. The concluding sections of the first part of the book are taken up by an examination of modern variants of the principal doctrines, which attempt either a return to natural law, or an elimination of certain errors of the normative school, or the construction of a social basis of international law. In the end, all these attempts, like their forerunners, are rejected as fruitless.

The author's own doctrine is constructed on a broad basis since, in his opinion, the premisses of all previous attempts are erroneous. For, in his view, the function of legal science is the study of social phenomena in a world of physical reality by empirical means. Law is not a command, for to regard it as such is to examine it purely from the standpoint of those to whom it is addressed. It is, instead, a conglomeration of social judgments which relate facts to individuals who are required to perform certain acts. These judgments are accompanied by guarantees, which consist either of enforcement action or in the creation of new judgments, e.g. for damages. The existence of the guarantee determines the legal nature of the social judgment. Yet these judgments are united in systems whereby they are correlated and reconciled. These judgments are either spontaneous and unwritten, or normative and therefore positive. Both are equally effective, although their relative preponderance may vary from country to country and according to the specific branch of law. If spontaneous, they have no source. Their existence, and not their cause, must occupy legal science, for the causes are manifold and are to be found in religious, rational, universal, local, traditional, and historical considerations. If positive, their actual application is of exclusive interest, although they are created by a recognized legal process. Spontaneous judgments emerge in the conscience of the members of the community, but their creation or approval by these members is irrelevant. In the end even enacted law operates only because it is rooted in the conscience of the members of the community. There is a hierarchy of norms, not of sources. Positive law, but not natural law, is a part of law as objective reality, although each legal system has its own characteristics.

Despite a somewhat unfamiliar terminology the author's doctrine is not entirely novel. Sociological in character, it can claim Ehrlich's *Fundamental Principles of the*

Sociology of Law (Engl. trans. 1936), as its predecessor so far as the material sources of law are concerned. Purporting to dispense with the search for the formal sources of law, it does not achieve its aim altogether, for the division of legal rules into spontaneous and normative comes near to the orthodox division into customary and conventional or statutory law. Faced with the problem of law without sanctions, it does not reject the need for the latter, but assumes the possibility of their existence, as unilateral power factors, even in the absence of superior authority, and thus avoids the question of the binding force of the law. However, it is doubtful whether either analytical jurisprudence or analytical sociology can satisfy the ultimate quest for the nature and causes of law, whether municipal or international.

K. LIPSTEIN

The North Atlantic Treaty, The Brussels Treaty and The Charter of the United Nations. By SIR W. ERIC BECKETT, K.C.M.G., K.C. London: Stevens & Sons. 1950. viii+75 pp. 10*s.* 6*d.*

This short book, a reprint of an address given to the International Law Association, is mainly concerned with the problem of the relationship of the North Atlantic Treaty with the Charter of the United Nations. Sir Eric's main contention, based on a penetrating analysis of the relevant legal provisions, is that the North Atlantic Treaty cannot be regarded as a regional arrangement within the meaning of the Charter, on the ground that one of the main purposes of a regional organization is to serve as a medium for the enforcement action of the United Nations, whereas the Atlantic Treaty provides merely for measures of self-defence. From this distinction follow important legal consequences. Thus the duty imposed by Article 54 of the Charter to keep the Security Council informed of plans for possible enforcement action does not apply to measures contemplated for purposes of self-defence. However, this volume, short though it is, contains much more than an examination of that central problem. With regard to every legal provision which Sir Eric examines he refers to points of legal interest which may themselves provide sufficient controversial matter for a separate study. One would wish that Sir Eric could have spared the time to give each of these problems that discerning examination for which he is so well equipped. As it is the book is thought-provoking in the extreme. That in itself is a great merit.

F. M.

A Commentary on the Charter of the United Nations. By NORMAN BENTWICH and ANDREW MARTIN. London: Routledge & Kegan Paul, Ltd. 1950. xxviii+239 pp. 18*s.*

To the considerable body of literature on the meaning and interpretation of the Charter of the United Nations, the volume under review is a noteworthy addition. The authors have, perhaps wisely, not ventured very deeply into the field of purely legal interpretation, and their book is addressed primarily to the interested layman. Furthermore, by referring frequently to the way in which the Charter has in practice been interpreted by the various organs of the United Nations during the five years of its existence, the authors have added considerably to the value and interest of the work.

The authors have adopted the now familiar device of discussing the Charter article by article; this makes generally for clarity of presentation, but it tends occasionally to obscure the vital interrelation of articles. The treatment of Chapter VI of the Charter suffers slightly from this defect, but it is difficult to suggest a more satisfactory way of dealing with the intricacies of Articles 33 to 38, and it would clearly be inappropriate in a work of this nature to give more than a factual account of the various methods by which the Security Council may become seized of a particular dispute or situation. As it is, this section of the book is, more than any other, illumined by frequent illustrations of the various ways and means by which the Security Council has, in practice, been called upon to consider such causes and effects of international tension as come within the purview of Chapter VI.

The value of this book lies in the conciseness with which the authors have managed to present a fair and uncontroversial analysis of the Charter. On a few occasions, however, one could wish for rather more explanation. The discussion of the voting procedure in the Security Council, to which the authors have rightly drawn attention in the Preface, is rather inconclusive, and more might have been made of the various methods by which the Security Council has, in practice, attempted to circumvent the restrictions of the 'double veto'. However, it is perhaps hypercritical to draw attention to any deficiencies which are the result, not of careless omission, but of planned policy; and it is a measure of the authors' success in elucidating the inconsistencies and vagaries of the text of the Charter that one should wish for a rather more ambitious and detailed treatment.

The texts of the Charter and the Covenant of the League of Nations are appended, and the Statute of the International Court of Justice is also available for easy reference. There is also a short bibliography which, while not pretending to be complete or authoritative, is nevertheless useful.

I. M. S.

Law and Peace. By EDWIN D. DICKINSON. Philadelphia: University of Pennsylvania Press. 1951. xii+147 pp. $3.25.

This book, which is of small compass in terms of number of pages, represents the considered judgment, of one of the most distinguished and progressive scholars in the field, on the main essential aspects of international law and organization. It is written with a grace of style and economy of expression which add considerably to its intrinsic value. It is one of those rare books which can be read, with great advantage, both by the beginner and the specialist. The beginner may miss some nuance or meaning which the expert will have little difficulty in grasping. But he is bound to benefit and to derive inspiration from the comprehensiveness and the wide sweep of the instruction contained in these lectures which, in a sense, provide a survey of international law as a whole. The specialist will find there a great deal which is familiar to him, but he cannot fail to be impressed by the power of synthesis and the conscientiousness and restraint with which the author discusses the central issues of the science of international law. Neither can he fail to profit from the reflection that, as Professor Dickinson's book shows, scholarship need not be identified with facile realism.

The titles of the chapters indicate to some extent the scope of these essays. They are: The Community of Nations; The Law of Nations; The Growth of the Law; The Law and Peace. In the first essay Professor Dickinson gives a vivid picture of the diversities and divergencies among the component members of the international community. For it is one of the themes of this book that the all-too-ready assumption of uniformity and the over-simplification of the problems confronting the effective development of the law are in themselves a source of danger. This may be so—though, it is submitted, there is room for no less emphatic insistence that there are certain fundamental postulates of law and ethics which no diversities can properly be allowed to obscure. Actually, in the chapter in which the author surveys the main problems of the Law of Nations he shows no disposition to condone the shortcomings of international law by broad assertions of its 'specific character'. His judgment on the principle of traditional international law which makes the treatment by the state of its nationals a matter of domestic jurisdiction is expressed in the following statement: 'It is no exaggeration to say that the German extermination camps, in all their incredible horror, were a culminating manifestation of the nation's juridical irresponsibility in the treatment or mistreatment of its subjects' (p. 42). On the problem of recognition he says: 'there is, or at least there has been in the past, neither right of birth, of recognition, or of continued existence in the international community' (p. 36). It is possible—and in the opinion of the present reviewer, probable—that he underestimates the volume and significance of the practice of states in the contrary direction. Thus it is not certain that the frequently quoted statement of Senator Austin in connexion with the recognition of Israel that no 'country on earth can question the sovereignty of the United States of America in the exercise of that high political act of recognition of the *de facto* status of a State' can accurately be interpreted, as Professor Dickinson interprets it (at p. 81), as meaning that a state is free to act in the matter regardless of legal principle. Senator Austin's statement probably meant no more than that there is at present no international authority endowed with jurisdiction to question the legal propriety of the important political act of recognition as exercised in any particular case by the sovereign state.

The chapter on 'The Law and Peace' is perhaps most directly expressive of the temper of these lectures. In discussing the form and substance of the American acceptance of the Optional Clause the author does not hesitate, with an emphasis conspicuous in a book characterized by moderation, to criticize the attitude of his country. He says: 'What an acceptance! . . . If this be leadership, assuredly it is leadership in the wrong direction. . . . Our country has great responsibilities and a corresponding capacity. As regards the matter here discussed, we can only say that thus far it has failed lamentably' (pp. 138, 139). It may be improper for a foreign observer to endorse or to question that criticism. However, while Professor Dickinson is thus critical of what in his view is no more than a mere gesture, he is not prepared to regard as 'mere phrase-making' the Universal Declaration of Human Rights. To do so, he says, would be 'myopic indeed'. For 'there are circumstances on which a report, a resolution, a renunciation, or a declaration may be used to advantage' (p. 119). Yet, it may be urged, there is some element of legal obligation in the acceptance of the Optional Clause by the United States; there is none in the Universal Declaration of Human Rights. Professor Dickinson would probably reply that the logic of the comparison is only apparent. He may be right about that. There is certainly no underestimate of the place of law in these essays. In the very Preface he utters a much-needed warning against the terse but somewhat unhelpful maxim that 'law is no panacea'. 'Law', he says, 'has a statecraft of its own.' He could have added that there are many things which are not a panacea, but which are indispensable to life. Law may not be the only condition of order, but it is an essential condition of it. In this there may be—as the author convincingly shows—an element of sterility in the controversy whether law precedes order or whether the reverse is the case.

H. Lauterpacht

Projet d'un code européen de droit international privé. By ERNST FRANKENSTEIN. Bibliotheca Visseriana, vol. xvi. Leiden: E. J. Brill. 1950. xv + 185 pp. Fl. 12.

The diversity of national systems of private international law has from time to time during the last hundred years prompted students of this branch of the law to concentrate their efforts upon the task of unification. Only one such effort was crowned by success, if success is to be identified with adoption by the legislature of several countries. However, the task is broader and must consist in the preparation of the groundwork for the eventual international structure, if such a structure should be regarded as desirable. Dr. Frankenstein is the latest starter in this field, but his previous theoretical and practical works represent a solid basis for his loftier ambition.

Dr. Frankenstein regrets the gradual identification of private international law with domestic law, but it may be doubted whether any other foundation is acceptable today, except that of international conventions. Certainly the method of the early writers, who attempted to determine the application of law in space by reference to the nature of the rules of private law themselves, according as they purported to affect persons or things, was vague and arbitrary. Moreover, even the statutist school, when it came to rely on the exclusive operation of local laws which were classified as *statuta realia* thereby translated into legal principles what were originally practical interests of territorial units which were about to assert their independence as states in the modern sense. Thus there is no escape from the national character of private international law, and the only aim can be to promote uniformity between what must remain national systems. Uniformity can be achieved by a convention or by unilateral adoption on the part of states of uniform rules. Whichever solution is adopted, experience shows that *renvoi* can thus be excluded. Dr. Frankenstein rightly accepts this conclusion. The vexed question of characterization requires less drastic measures, and the author proposes a solution which differs little from that offered by Beckett, Rabel, and Falconbridge. Much greater difficulties arise where details are concerned. The author restricts his efforts to the development of a Code for the countries of the continent of Europe and excludes common-law countries on the ground that they are adverse to codification and to the formulation of abstract rules. It must be admitted that a Code consisting of 816 articles, where each article is no longer framed in terms of a rule of private international law, but contains a choice of law clause attached to a rule of domestic law cannot easily be accepted by a common-law country, especially if the rules of domestic law are expressed in civil-law terms. But even within the circle of civil-law countries, the author recognizes the possibility of differences based not only on grounds of public policy but of fundamental differences of institutions and policies in general. He bridges this gap by offering solutions such as that the choice of law exercised under the new Code is to be recognized everywhere except in the country of the *lex causae* (see, e.g., Articles 112, 114, 115, 116, 180, 327, 330, 577).

This admission of defeat is not serious, but it provides a strong argument in favour of the theoretical basis of the *status quo*, even if not of the *status quo* itself. Whatever the ultimate aim, the author's detailed treatment, based upon extensive and profound knowledge of the legal systems involved and of their specific difficulties and problems which have arisen in the courts which had to administer their own rules of private international law, is admirable and will prove most useful. Not unlike the American Restatement of the Conflict of Laws, it may assist courts and writers and stimulate constructive criticism.

K. LIPSTEIN

Sistema y Filosofía del Derecho Internacional Privado con especial consideración del Derecho Internacional Privado Español. Tomo II. By Werner Goldschmidt. Barcelona: Bosch Gimpera. 1949. xiv + 576 pp. 100 pesetas.

The characteristics of this work were outlined by the author in a series of monographs and articles. They were developed more fully in the first volume of this treatise which justified its title by providing a strictly logical structure for private international law, but failed to offer a detailed philosophical system which applied to all its aspects. Instead, the author relied on a general jurisprudential approach, especially in his treatment of the bases of private international law. Like Savigny, he starts from the premiss that private international law has to deal with an international community governed by law. But while Savigny envisaged the community of law created by the expansion of Roman law in the Middle Ages for the purpose of justifying his technical process of laying down rules of private international law with universal validity, Dr. Goldschmidt looks to the Christian World in order to ascertain the material basis of its autonomous rules. Thus he rejects the doctrine of the statutists which derived its tests from the formal nature of the rules of material law as well as the doctrine of incorporation and relies on Savigny's advice to ascertain the seat of the case.

In his search for the material basis of his rules, he turns, in the first place, to natural law which, in his view, provides the rules for International Tribunals. It may be doubted whether natural law can offer any solution for problems of a technical nature which are, at best, teleological in the sense that they involve questions of policy. It is certain that International Tribunals have not followed this method (see *Transactions of the Grotius Society*, 29 (1943), pp. 51 ff.), even if the Mixed Arbitral Tribunals professed at times to apply principles of private international law which were of universal validity (ibid. 27, pp. 142 ff., at p. 153). Nor could it be otherwise, for the problems of private international law which confront International Tribunals differ greatly from those before municipal courts. The former possess no *lex fori* in matters of private law. *Renvoi* is thus inapplicable and public policy is determined by the rules of public international law. In the second place, Dr. Goldschmidt relies on general principles, but the attempt to identify Ulpian's general maxim (D. I, 1, 10. 1) 'honeste vivere, neminem laedere, suum cuique tribuere' with one modern axiom (equality), one doubtful doctrine (protection of acquired rights), and one technical device (the function of public policy), is not very convincing. In the third place—and this is a special merit of the author—he relies to a great extent on bilateral and multilateral treaties. Finally, Spanish law is taken into account together with the generally accepted rules of other legal systems. Reliance on the latter is indispensable in a treatise based on the law of Spain seeing that Spanish case law is scanty as a result of the practice of publishing only the decisions of the Supreme Court, but not those of the other courts of the judicial hierarchy.

The outstanding result of the author's insistence upon the importance of the seat of the case is that he combines the connecting factors with the operative facts in the formulation of his rules of private international law. This method may not offer any special advantage by itself, but it brings out the author's point that the primary function of private international law is not the search for the identification of the facts of a particular situation with the operative facts of a particular rule of domestic private international law, but the need to localize each factual situation by providing detailed rules which take into account the various local connexions. The consequences of this view do not affect the treatment of every aspect of the technique of private international law. No new solution for the problem of characterization, the incidental question, or public policy arises therefrom. On the other hand, it focuses attention upon the technique and importance of connecting factors and upon the need to link them to typical situations (persons, things, acts) rather than to legally relevant situations (operative facts). The meaning of this approach becomes more apparent in the treatment of *renvoi*, where the English solution of total or double *renvoi* is adopted, for according to the author, to apply foreign law is to apply the probable foreign decision. This would appear to mean that the *forum* is not referred to foreign law, and that foreign law as such is neither required to be proved nor applied by the *forum* to the facts in issue. It is the task of the court to inform itself of the hypothetical decision of the courts of the foreign country the law of which is made applicable by the rules of private international law of the *forum*. Thus the court is made to abdicate its entire power to the experts, but such abdication is likely to lose much of its effect if the foreign experts conflict. The author believes that his doctrine of the incorporation of the probable foreign decision supplies the answer to the question of what is the place of foreign law in a legal system. He dismisses all previous doctrines, whether they rely on formal or material incorporation, the protection of acquired rights or any other explanation. But in so doing he fails to explain how his view as to *how* foreign law is called in aid by local courts can also provide the clue *why* foreign law is applied. If such an explanation were forthcoming it would probably take the form of a somewhat unattractive theory of autonomous respect for the foreign judicial protection of foreign acquired rights. In substance Dr. Goldschmidt has developed a system which accepts the national character of private international law upon the basis of considerations of general jurisprudence which purport to be of international validity.

In the second volume Dr. Goldschmidt turns to the individual rules of Spanish private international law. Here the discussion is strictly practical and casuistic. Only the plan of the work reveals his particular theoretical approach which he turns to good use. For his treatment concentrates, first, on the various connecting factors and proceeds then to an exposition of individual rules under two main headings which are subdivided. They are (1) situations affecting one person; (2) situations affecting several persons according as they contain (*a*) a formal, (*b*) a proprietary, (*c*) an individualistic, or (*d*) a voluntary element. It is understandable that in a treatise based upon a system which relies primarily on the *lex patriae* some attention must be devoted to nationality. Dr. Goldschmidt offers a detailed commentary on the Spanish law of nationality, but it is not easy to follow his basic distinction (p. 23) between the spiritual approach, which Spanish law is said to follow in this matter, and the materialistic approach of other countries, for neither type would appear to exist in an unadulterated form (p. 26). Again, his attack on the current distinction between original and derivative modes of acquiring nationality (p. 35), while logically unassailable, does not lead to new positive conclusions. On the other hand, he underlines rightly the fact that the term nationality, when applied to corporations, may embrace two different meanings according as it refers to political allegiance or serves as a connecting factor in private international law (pp. 60, 62).

The chapters on the remaining connecting factors do not quite fulfil the high hopes which the author's systematic approach to this topic had raised. Generally speaking, they suffer from compression. This applies, in particular, to the discussion of the *locus delicti commissi* where American writers and practice have recently given an interesting lead. Compression does not, however, affect the main part of the volume which covers in a little less than 400 pages the entire field of private international law. This is a remarkable achievement, for the author discusses not only Spanish law but also the other main legal systems and pays special attention to international and bilateral treaties, including the Bustamante Code. In substance, he deals with problems which are partly common to all systems of private international law, partly peculiar to civil-law systems (absence, interdiction of prodigals, merchants) and partly characteristic of Spanish law (Spanish Consular marriages, questions concerning Spanish shipping, such as proprietary rights in ships, the powers of the captain, contracts affecting the crew). Moreover he includes such topics as Average, Salvage, and Copyrights. It is impossible here to single out individual problems, but it may be noted that the chapters on form, marriage and nullity, parents and children are especially instructive from the point of view of Spanish law. In the law of contract the author adheres to free choice of law in accordance with the modern doctrine which treats the admission of free choice merely as the recognition of one additional connecting factor. Thus it is independent of the question whether freedom of contracting is permissible under the domestic law of any of the legal systems which may be applicable.[1] Another attractive feature is the attempt to ascertain special rules applicable to individual types of contracts. On the other hand, gold clauses and the problems connected with devaluation are not included.

Additional chapters deal exhaustively with Judicial Assistance, Procedure, Evidence, Proof of Foreign Law, Foreign Documents, Foreign Judgments, Bankruptcy and the position of their effect and enforcement, including *lis pendens*, foreigners in court, and more briefly with jurisdiction in matters of criminal law. To each of these topics the author has his own contribution to offer. In the chapter on Judicial Assistance use could have been made of the Harvard Draft, *American Journal of International Law*, 33 (1939), Supplement, pp. 11–166, but this omission does not render the chapter less valuable. Filial piety must account for the fact that a special place is accorded to a branch of the law which stands somewhere between substantive law and the law of procedure and which has become known by the name of *Materielles Justizrecht* (*Derecho Justicial Material*),[2] but the author follows his distinguished father[3] in assuming that the ordinary rules of private international law apply here as well. Substantial appendixes contain the texts of the bilateral Conventions in matters of private international law concluded by Spain and what is virtually a case book on Spanish private international law.

Partly by choice and partly through force of circumstances the author has written a text-book on comparative lines. Sound knowledge and broad vision, a leaning towards systematics and a feeling for policy and practical needs are its characteristics. Its ambit far exceeds the sphere of Spanish and Hispano-American law. Its method deserves the attention of all students for its use of treaties and diplomatic practice.

K. LIPSTEIN

Lehrbuch des Völkerrechts. By PAUL GUGGENHEIM. Verlag für Recht und Gesellschaft. Basel. 1947–51, two volumes. 1,044 pp.

A number of important text-books on international law have been published in Europe since the war. Professor Verdross and Professor Redslob were already well known to international lawyers all over the Continent, and Professor Rousseau has established himself as an authority through the first volume of his monumental book on international law. Professor Guggenheim has long been recognized as a profoundly learned and critical writer on international law and related subjects. Those who have had the good fortune of being among his students at the Post Graduate Institute of International Studies in Geneva know of his superb qualities as a teacher. For many years he has been working on a text-book on international law and he has whetted our appetites by sending out the book in six instalments over a period of nearly four years. Now, at last, we have two complete handsome volumes with table of contents, index, and list of misprints.

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[1] See Moser, *Vertragsabschluss, Vertragsgültigkeit und Parteiwille im Internationalen Obligationenrecht* (1948) and this *Year Book*, 25 (1948), pp. 488–89.

[2] See the bibliography cited vol. ii, p. 318, Note.

[3] *Zivilprozessrecht* (1929), p. 30.

Professor Guggenheim combines profound learning with lucidity and simplicity of exposition. Possibly, it might be even easier for the reader to assimilate the material if the author could adopt a system of paragraphs instead of a mixture of Roman and Latin numbers, capitals and other letters, followed by double letters and treble letters such as fff and bbb succeeded in their turn by Greek letters. Apart from this very minor criticism of the method, it is difficult to find anything but praise for the book.

Dr. Guggenheim expounds not only international law but also Swiss practice. His book is an excellent introduction to the study of international law from the point of view of the positivist who is strongly influenced by Kelsen, but who has—strange to say—his feet more solidly on the ground and is even less influenced by ideologies than the great master of the pure theory of law. The book is also a very good handbook in that it deals with most problems of law and peace—though often in a very cursory way. That is inevitable in a two-volume text-book. But the shortness of the text is remedied by full notes and a rich bibliography.

Law, that is the science of law, states Guggenheim (p. 2) is a legal interpretation of a state of fact; all law forms one system of rules with international public law at the summit. National law which conflicts with international law will, consequently, be internationally invalid (p. 24). Like Hans Kelsen, Georges Scelle, and other modern continental scholars, Guggenheim is thus uncompromisingly in favour of the 'primacy of international law'. He has developed some interesting ideas on the formation of customary law (pp. 46 ff.) as being based on custom alone without the need of proving any *opinio juris*. The facts and the facts alone are sufficient without any hypothetical psychological basis. It is also believed that the author is right in assuming (p. 55) that treaties really form a secondary source of law, in so far as they are subordinated to customary law. Interesting are his remarks on the *clausula rebus sic stantibus* (pp. 115 ff.) and the possibility of lacunae (or gaps) in the law (pp. 139 ff.). On the other hand, his treatment of interpretation of treaties (pp. 124 ff.) is disappointingly weak. It is due to the rapid development of international law and not to any defects in Dr. Guggenheim's reasoning that the treatment of human rights and of asylum already seems slightly out of date. The few remarks on the Calvo Clause (p. 535) are apposite and his observations on the punishment meted out to individuals for acts against international law are worth studying (p. 541). The author's remarks on the non-existence of so-called justiciable disputes (p. 605) will be fully approved by many, including this reviewer. Professor Guggenheim's exposition of the laws of war and neutrality is short, up to date, and practical.

It is to be hoped that a new edition of this important work will be published in French or English so that it will be more readily accessible to a greater reading public than a book in the German language.

E. Hambro

International Law. The Collected Papers of Sir Cecil Hurst, G.C.M.G., K.C.B., K.C. London: Stevens. 1950. ix+294 pp. 30*s.*

It was a happy inspiration which led to the publication of this book in honour of the eightieth birthday of Sir Cecil Hurst. The book is divided into four parts. Part One consists of presidential addresses before bodies of international lawyers; Part Two of articles published in this *Year Book*; Part Three of papers read before the Grotius Society, and Part Four of a course of lectures on the subject of Diplomatic Immunities delivered before the Academy of International Law in August 1926. Apart from the convenience of having this collection of papers gathered together in one book it is fitting that we should have the opportunity of observing and paying tribute to the special characteristics of Hurst's writings over a period of thirty years. We can thus see at once that the peculiar merit of Hurst's work lies in a clarity of thought and in a lucidity of expression which has already ensured that his articles, even if written two or three decades ago, remain to this day in the forefront of the literature of international law.

In his presidential address to the Institute of International Law in 1937, Hurst concerned himself with the question how rules of customary international law come to be established. He pointed out the peculiar advantages of having these rules elucidated by unofficial bodies of experts such as the Institute since international conferences must lead either to a new convention—in which case the convention is not necessarily a statement of the existing law—or, more probably, to failure through inability to obtain the necessary consensus of opinion. If some states sign the new convention and others do not, little progress has been made towards discovering the general international law, with the result that the position of the non-signatory states becomes more equivocal than ever. Governments are in fact the very worst interpreters of the existing law since they are bound to seek to interpret it and modify it in their own interests, as was illustrated by the failure of the London Naval Conference of 1908–9. Of course Hurst did not mean to minimize the role of the International Court as an interpreter of customary international law, but he pointed out that it was only rarely that cases involving questions of customary law came before the Court.

In his other presidential address, delivered before a Conference held by the Grotius Society in 1944, Hurst turned to a consideration of the nature of international law and described it as 'the aggregate of the rules which determine the rights which one State is entitled to claim on behalf of itself or its nationals against another State'. States are equal before the law by virtue of their independence, which is the essence of their statehood. Because of this equality before the law no state can claim from other states a rule of behaviour to which it would not itself conform. Further, since the duty of the caring for the well-being of its people and the protection of their interests is one of the normal functions of a state, and since this involves putting forward claims against other states, the state putting forward the claim cannot possibly dispute the fact that it is itself bound by the rule of law. Thus, for Hurst, 'international law is the necessary concomitant of statehood'. There is a characteristically reproaching simplicity about such an approach which avoids the pitfalls encountered by those who say that international law binds states because of their consent to be bound and who then have to stretch the conception of implied consent to the utmost in order to complete the picture. Moreover, the conventional explanation still leaves it possible for a state to refuse to be bound by the rules of international law and yet remain a state whereas, if Hurst's view is adopted, a state not bound by international law would be a contradiction in terms.

Readers of this *Year Book* will not need to be reminded of most of the articles that have appeared in its past volumes. The article on Diplomatic Immunities which first appeared in this *Year Book* in 1929, together with the course of lectures delivered at the Academy of International Law in 1926, represent a fairly comprehensive treatment of a subject which never lacks interest or importance. The historical aspect, the views of the writers and the cases, both English and foreign, are all subjected to an analysis which never fails to throw light on a branch of the law where practice is never uniform and principle sometimes obscure. The article on 'Nationality of Claims', which first appeared in this *Year Book* for 1926 has long been regarded as a leading authority on a most difficult subject. In it Hurst describes the *Studer* case between Great Britain and the United States before the Pecuniary Claims Commission in 1925—a case otherwise not well known—discusses the more famous *Stevenson* claim of 1903, Ralston's Judgment in the *Corvaia* case (also in 1903), the *Alsop* claim (1911) as well as two cases before the Anglo-German Mixed Arbitral Tribunal (*Klingenstein* v. *Maier* and *F. Lederer* v. *The German Government*), and formulates his conclusions at the end of the article in a manner which is the very model of clarity. In an article entitled 'Wanted! An International Court of Piepowder' published in 1925, Hurst complained of the delays involved in settling the international claims of private citizens and suggested an international tribunal before which such claims could be brought. If such a tribunal were set up, with compulsory jurisdiction but with a swift and simple procedure, it would then be possible to have an international statute of limitations. Various other cases arising out of wrongs done to individuals, of which the most famous was *Brown*'s case, are discussed in the article 'State Succession in Matters of Tort' published in this *Year Book* for 1924.

In an article published in 1921 Hurst discussed 'The Effect of War on Treaties' and the various theories to which this matter had given rise. As usual, he went to the root of the matter in saying that the rule was that 'the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties when the treaty was concluded', with the result that the problem facing international lawyers was the practical one of 'formulating a series of presumptions to meet the cases where the words used in the treaty itself do not show clearly what was the intention of the parties at the time when they made it'. Writing at the end of another World War Hurst made *A Plea for the Codification of International Law on New Lines.* He stressed that the urgent matter was to obtain agreement on principles first of all, leaving the detailed application of those principles to be worked out later. Here he returned to the theme that work of this sort was best not done by governments but by 'international lawyers working with a full measure of independence and on a purely scientific basis, that is to say, working as scientists and not as government delegates'. Only in this way could we avoid a repetition of the failure of the attempts at codification made after the First World War. Codification Conferences which aimed at producing Conventions were bound to fail in their main object. Nevertheless Hurst was a believer in codification.

The cases coming before international tribunals were far too few to constitute an adequate corpus of judge-made law, whilst the importance attached by international law to state practice as compared with judicial decisions made it impossible for the system to develop in the same way as the common law in Anglo-American countries. It must be assumed, however, that Hurst would approve the efforts of the International Law Commission, because he admitted that even the experts could achieve nothing without official encouragement, and he gave his blessing to Article 13 of the Charter.

It says much for the lasting quality of Hurst's work that those of his articles which perhaps are most often referred to today are 'The Territoriality of Bays' (this *Year Book* of 1922–3) and 'Whose is the Bed of the Sea?' (ibid., 1923–4). In the former Hurst discussed all the extant authorities on the subject of bays such as Lord Hale's test of 'reasonable discernment', *Regina* v. *Cunningham* (1859), the *Conception Bay* case (1877), the Anglo-French Fishery Convention (1839), the North Sea Fisheries Convention (1882), the Anglo-Danish Fishery Convention (1901) as well as the *North Atlantic Fisheries* arbitration (1910) and M. Drago's Dissenting Opinion. Hurst came to the conclusion that the ten-mile rule adopted in 1882 simply gave precision to the 'reasonable discernment' theory and was but a crystallization of nineteenth-century usage. In the still more famous article entitled 'Whose is the Bed of the Sea?', Hurst was concerned to reconcile the existence of sedentary fisheries outside the three-mile limit with the freedom of the seas. This he did by pointing out that, so long as the right to navigate and fish in the seas above was not affected, there was no reason why states could not claim title to sedentary fisheries on the basis of historic usage. It is a pity that it was not found possible to include in this volume Hurst's report to the Institute of International Law in 1925 (*Annuaire* 1925, pp. 159–61) because its inclusion would have given a greater unity to Hurst's writings on the law of the sea. In the report, more explicitly than in the article, Hurst concluded that the high seas were *res communis*, not susceptible of occupation, whilst the sea-bed and the subsoil were *res nullius* and capable of occupation at any rate by the littoral state. This subject has continued to attract the attention of Sir Cecil Hurst, and in December 1948 he read a most illuminating paper before the Grotius Society. Recognizing frankly that international law must face a situation in which the extraction of oil from beneath the bed of the sea was fast becoming an accomplished fact, Hurst nevertheless subjected President Truman's Proclamation of 28 September 1945 to a penetrating analysis and came to the conclusion that though the Proclamation only spoke of 'jurisdiction and control' it virtually laid a claim to sovereignty over the area of continental shelf annexed by the United States. He then expressed some alarm at the way in which his earlier article, dealing essentially with the specific problem of sedentary fisheries, had been used as an authority for justifying wholesale annexations of vast areas of continental shelf. In the 1948 paper Hurst did not attempt to reach final conclusions on the new problem so suddenly confronting international lawyers, but he emphasized strongly that the existing principles governing sedentary fisheries were not applicable to the continental shelf for three reasons. First, the areas involved were so much greater and annexation of them would interfere with the traditional freedom of cable-laying; secondly, there seemed to be no limit to the variety of resources now capable of being obtained from beneath the sea; thirdly, exploitation of the resources now obtainable would no longer be possible without the erection of installations gravely prejudicing the freedom of the high seas. These and other questions, such as the juridical status of pipelines and derricks used for obtaining oil, were left unanswered in a paper which was nevertheless one of the most stimulating that Hurst ever wrote. That no one could even attempt to answer them without referring in detail to Hurst's two papers, written at an interval of twenty-five years, is but one proof, among many others, of his right to be considered one of the outstanding international lawyers of this generation.

D. H. N. Johnson

Um Recht und Gerechtigkeit. Festgabe für Erich Kaufmann. Stuttgart: W. Kohlhammer. 1950. vii+402 pp. DM. 15.

The twenty-three studies, presented to Erich Kaufmann on his seventieth birthday, cover a wide range of topics, from philosophy and history to international law, constitutional law, and conflict of laws. Some of them—notably those by von der Heydte and Smend—are concerned with an interpretation of Kaufmann's contribution to legal science. Others, such as von Hippel's study of Goethe's political beliefs, are mainly of academic interest. However, the majority of the articles are concerned with legal problems, ranging over many branches of the law, which are of practical importance in Germany at the present day. It is in this picture of the practical concerns of a state that the main interest of the book lies.

Several articles are concerned with aspects of the new Constitution of the West German Federal Republic. We may note, in particular, Professor Glum's study of the difficulties attendant upon the formation of governments in countries with a large number of political parties. That problem is of considerable importance, for the inefficient administration of a succession of unstable coalition governments tends to produce popular support for totalitarian groups. Also of importance, from a similar practical point of view, is Professor Scheuner's discussion of the methods, both political and judicial, whereby constitutional provisions may be 'protected'.

International law is the subject of a number of important contributions. Attention should be drawn, in particular, to Professor Jellinek's analysis of the provisions of German Federal and State Constitutions concerning the 'adoption' of international law; to Professor Jahreiss's study of the problem of state sovereignty, by reference to the provision of the Federal Constitution which expresses Germany's readiness to modify her sovereignty in the interests of international peace; and Professor Makarov's careful compilation of the measures taken to compensate aliens for property expropriated as a result of measures of nationalization in various European countries. Noteworthy also, less because of its intrinsic interest, but because it may be representative of a school of thought, is Dr. Kranzbühler's study of the Nuremberg trials. Two aspects of it are significant. In the first place, the assertion is made, in connexion both with the economic exploitation of occupied territory and the crime against humanity now known as genocide, that such acts should be regarded as international crimes only if they are considerable in extent, and that at Nuremberg this requirement was not satisfied. It is evident from the trials that both offences were practised on a horrifyingly large scale by Germany during the war. Secondly, the writer challenges the basis of the trials with the contention that in war the individual's loyalty to his state must come before his duty to international law. Such a view marks a return to primitive concepts of war. The whole modern law of warfare has been based on the assumption that there are certain obligations to humanity in general which no interest of the state can diminish.

Finally, some studies on private law and the conflict of laws are deserving of mention. Professor Dölle examines the problem of the legal equality of man and woman—a problem well to the fore in legal thought in many countries. Professor Stödter discusses, by reference to restitution laws enacted by Allied Zonal Governments in Germany, the important question of the territorial limits of legislative power.

There is much that is of interest and value in this volume. Moreover, so wide is the ground covered by it that most readers will find at least a few studies which appeal to their particular taste.

F. M.

The Law of the United Nations. A Critical Analysis of its Fundamental Problems. By Hans Kelsen. London: Stevens & Sons Ltd. 1950. xvii+903 pp. 5 gns.

Professor Kelsen's treatise is likely to remain for a considerable time the most useful, scholarly, and stimulating commentary on the Charter of the United Nations. It is fortunate that one of the greatest jurists of our time has found it possible to devote his energies to this subject and to draw attention, with an unparalleled authority, to the shortcomings of the Charter conceived as a legal instrument. Even prior to the appearance of this treatise it was clear to those who had the opportunity of studying the text of the Charter and its working in practice that it is an instrument which bristles with inconsistencies, contradictions, omissions, and ambiguities. The cumulative impression of Professor Kelsen's analysis is almost to create doubt whether a document, the faults of which as a legal instrument are so tangible and transparent, calls for the very considerable effort which a scholar of the author's distinction and power of analysis has bestowed upon it. However, the devastating impact of his criticism is tempered by two considerations: The first is Professor Kelsen's own legal relativism to which he gives weighty expression in the Preface. He voices there the view that every legal provision admits of a number of possible legal interpretations and that it is unscientific—except, perhaps, for the judge himself—to insist that one particular interpretation only can yield the correct juridical result. The business of the lawyer, it seems, is to present a number of choices, each of which is logically possible, to the adjudicating authority. And it appears that, in Professor Kelsen's view, the final choice is made by the judge by reference not to legal standards, but to extra-legal considerations. This somewhat startling proposition the author puts in the following words: 'The task of a scientific commentary is first of all to find, by a critical analysis, the possible meanings of legal analysis undergoing interpretation; and, then, to show their consequences, leaving it to the competent legal authorities to choose from among the various possible interpretations the one which they, for political reasons, consider to be preferable, and which they alone are entitled to select.' The reader may be inclined to think that if the ultimate choice is effected for political reasons it may be difficult to see the purpose of accurate legal analysis, for there seems to be no reason why the political choice should not legitimately fasten on a solution which, from the point of view of law and legal logic, is inferior and arbitrary. However that may be, in the light of the general function of interpretation as considered by Professor Kelsen, the juridical imperfections of the Charter are of a theoretical interest rather than of practical importance. For even if the Charter were a better instrument than it is, the ingenuity of scholars and commentators would still be in the position to construe a large number of logical possibilities, the choice between which would be ultimately determined by a political decision.

This latter consideration leads to the second factor which somewhat limits the apprehension raised by the author's dissection of the Charter. That factor is the circumstance that many of the difficulties and problems raised by Professor Kelsen, although within the range of logical possibility, are of the author's own making and of inconsiderable practical importance. This applies especially to his strictures upon the terminology of the Charter. He questions, for instance, the propriety of the expression 'inherent right of . . . collective self-defence'. He argues that an inherent, natural right can logically refer only to individual self-defence. The argument is questionable. Collective self-defence is no more than intelligent and farseeing individual self-defence which proceeds on the assumption that mere individual self-defence is an invitation to the aggressor to dispose piece-meal of his prospective victims. Collective self-defence is not unknown even among animals.

It is probable that the sub-title of the work does not convey a fully adequate impression of its contents. For Professor Kelsen's treatise is an imposing and powerful exercise in juridical logic—by reference, admittedly, to the actual practice of the United Nations, an account of which constitutes a prominent feature of the book. It does not, save exceptionally and in disregard of the method deliberately adopted in the volume, discuss the fundamental problems of the United Nations in terms of a philosophy of international organization or otherwise. But it is difficult to combine many tasks, properly executed, in one work. We must be grateful to Professor Kelsen for a great commentary into which he has woven an abundant documentation and a detailed account of the practice of the United Nations. No serious student of the subject and no statesman or official called upon to interpret or apply the Charter of the United Nations can afford to disregard it or to read it with anything but the closest attention.

H. LAUTERPACHT

International Law and Human Rights. By PROFESSOR H. LAUTERPACHT, K.C., LL.D., F.B.A. London: Stevens. 1949. 475 pp. £2. 10*s*.

Professor Lauterpacht has achieved a remarkable place in the English literature of international law, as editor of this *Year Book* and of the *Annual Digest of International Law Cases*, as the editor of Oppenheim's standard work, and as the author of several treatises, particularly concerning recognition of states and human rights. To comprehensive knowledge he adds vision and a reforming ardour. He is zealous for the extension of the legal order, so that it may be an effective instrument of that world society which, in spite of the antagonistic forces of power politics, is visibly and consciously being created. He is a leader of the movement away from the positivist conception of international law towards a twentieth-century version of the law of nature. His most notable contribution, perhaps, has been made to the doctrine of the international assurance of the rights of man—or human rights, as they are called in the Charter. In 1945, before the Conference of San Francisco, he published a monograph, *An International Bill of the Rights of Man*, in which he drafted a code of those rights which should be enjoyed by every person; and he proposed the international machinery for vindicating them. That book admittedly had an important influence on the relevant provisions in the Charter, and still more on the form of the Universal Declaration of Human Rights which was drawn up by the Human Rights Commission of the Economic and Social Council, and adopted by the Assembly in 1948. He is not, however, at all contented with the outcome of the matter since the establishment of the United Nations. It is his conviction that the bright hopes which were raised in 1945 and 1947, when the first draft Bill was examined by the Commission, have been imperilled by the later action of the United Nations in this time of fears. The Declaration, so far from being a triumphant advance, appears to be a step backward. He has set himself in this new and maturer work on the former theme, written in the light of the experience and discussions of the last five years, to lay down again the broad principles of a programme intended to secure, as the Charter proclaims, respect for human personality and the protection of the rights of man.

He analyses the primary postulates of international law in its relation to the individual man; to what extent he is, and should be, a subject of international rights and duties; to what extent he has, and should have, access to international tribunals; and to what extent the law of nations should modify the absolute doctrine of national sovereignty in regard to the individual. Further, before he comes to his principal subject, which is the action of the United Nations regarding human rights, he reconsiders one of the main themes of his earlier book, the relation of the law of nature to the rights of man on the one hand, and the relation of international law to the law of nature on the other. That leads him to a central thought, the interaction of international law, the law of nature, and the doctrine of natural rights. He concludes the introductory part with an historical study of the English sources of the doctrine, beginning with Magna Charta.

He is not content with analysis and examination and historical study of what has happened, or with generalities about the present and the future. He is at pains to set down in black and white a list of the changes which he regards as necessary in the Statute of the International Court of Justice, and in the International Bill of Human Rights—including articles for what the jurists call implementation—if the fine-sounding provisions of the Charter are to be carried into effect. A right of the individual to petition is indispensable.

The main ideas of this constructive book, which is at once theoretical and practical, call for some detailed examination, since the subject is so actual. A broad trend of the Charter of the United Nations, as compared with the Covenant of the League, is to transform the individual from an object of international compassion into a subject of international rights. The idea that international law is restricted to the relations of states, and that the international court is restricted to the suits of states, is being more and more modified by the inroads of Conventions and of the decrees of the International Court of Justice itself. A striking example is the recent Advisory Opinion of the Hague Court concerning the liability of a state to make reparation to the United Nations, and to his family, for the death of an officer of the United Nations killed in the course of his duties. 'Throughout its history, the development of International Law has been influenced by the requirements of national life; and a progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by entities which are not States.'

One of the characteristics of Professor Lauterpacht's approach is the magisterial analysis of the judgments of the International Court and of statements of the organs of the United Nations. At times he may read into them more than authors intended. But that is the way of precedent, to be applied pregnantly, and so bring about a gradual evolution of the law. So he deduces from the opening words of the preamble of the Charter: 'We, the peoples of the United Nations'—which may have been decorative—that the sovereign state is no longer the exclusive person of 'organised international intercourse based on treaty'.

In Part Two of the book he examines from every aspect the treatment of human rights in the Charter. He considers the effect of the clause excluding matters essentially of domestic jurisdiction, having regard to the natural construction of its wording and also to the practice of the Assembly and the Security Council in the matters of the India–South Africa dispute, the case of Spain, and the treatment of individuals in Bulgaria and Hungary. The technical meaning of 'intervention' is expounded, and distinguished from 'interference'. He considers what has in fact been done for the implementation of the principles of the Charter, and is righteously indignant over the surrender by the Commission of Human Rights to the wishes of the Great Powers who oppose the right of petition of individuals complaining of violation of rights. He argues that the right of petition is a natural and irreducible right, as was recognized in the first drafts of the Bill. That makes its abdication the more discreditable. The adoption of the Universal Declaration offers no comfort, for it is in no sense binding, either legally or morally. It is self-deception, he argues, to read into the Declaration more than it professes to be, which is a standard of perfection; and it does not even contain a recommendation to the states to observe its principles. It was acceptable to all because it imposed obligations on none. Professor Lauterpacht brings a big legal hammer to crack a small moral nut: to vary the metaphor he cuts away, with the jurist's shears, the shreds of the moral clothing from the Declaration.

Having cleared the way, he drafts a Bill which should be the basis of a binding Convention. The Human Rights Commission has occupied itself during the last two years with proposals for a Convention; but the clauses in it relating to enforcement are woefully weak and inadequate. Professor Lauterpacht's draft may be criticized for this or that point or omission; but it does squarely face the vital problem of implementation, and it should afford guidance for the Convention at least as valuable as was his guidance for the abortive Declaration.

In the last part of the book he deals with a fresh practical issue; the proposed European Bill of Rights, Commission of Human Rights, and Court of Human Rights. Those projects of the Consultative Assembly of the Council of Europe have advanced since the book was written, and the prospect for positive action is fair. The Commission and Court are in the forefront of the programme of European Union. Yet even in this democratic association of free, like-minded states, the proposals for judicial supervision fall below a just standard. It is contemplated that the international procedure in the first place will be non-judicial, before a Conciliation Commission, as the author himself suggested in his earlier book. But objection is taken to the recommendation that the Commission shall have power to decide by a majority whether to transmit a case to the Court. The right of the individual to turn to the Court for judicial decision should, in his view, be absolute. In this connexion he does not mention the French proposal, submitted to the Human Rights Commission of the United Nations, for the appointment of an Attorney-General (Ministère Public), who would present to the Commission or the Court the complaints of an individual or body which he found to be worthy of consideration. The idea is that he should be a link between the individual and the international organ, and so bridge the gulf between the exclusion of a private person or group from direct access to the Tribunal and the recognition of the individual as a full subject of international law. That proposal seems to merit careful scrutiny.

In the concluding section the author allows himself to contemplate a larger vision of the federation of the world, a *Civitas Maxima*. For him that ideal, the idea of sovereignty and the international protection of the rights of man are bound up. Adopting the judgment of Kant, he regards a World Federation as the only means of obtaining a perfect internal government and, therefore, as an object of moral duty of positive action and a practical standard of human endeavour. At the same time realism leads him to accept the advance to the ultimate goal through regional confederation of like-minded states. The direct relation between the human being and the federation through the assurance of human rights by a federal organ and court 'offers possibilities which, being less drastic in nature, may become a factor of deep significance in the evolution of the federation of the world'. Here is the chosen lever for breaking down the time-dishonoured conception of the absolute sovereignty of the National State. The 'vision splendid' attends the enthusiastic jurist, and gives to his legal reasoning an emotional warmth lacking in one of his contemporary masters, Hans Kelsen, who has written recently on the big issues of the United Nations.

Lastly, it may be mentioned that the book is admirably produced, with generous pages and large print and, as far as the reviewer could note, not a single misprint, and is equipped with an excellent index.

NORMAN BENTWICH

British Nationality (including citizenship of the United Kingdom and Colonies and the Status of Aliens). By Clive Parry, M.A., LL.B. (Cantab.). London: Stevens & Sons Ltd. 1951. xix+216 pp. 30*s.*

Mr. Parry, one of the 'specialist editors' who, under the guidance of Dr. J. H. C. Morris, are responsible for the sixth edition of Dicey's *Conflict of Laws*, had originally undertaken to revise the chapter on Nationality which for many years had been included in that work. The question whether it should be retained was a difficult one, particularly in view of legislative developments resulting in the British Nationality Act, 1948. It was eventually decided in the negative by virtue of Dr. Morris's casting vote; see his Introduction to Dicey's 6th edition, p. xiv. It necessarily followed that Mr. Parry's chapters on Nationality were to be published as a separate work. This has now become available and it is a pleasant task to extend a hearty welcome to it.

Apart from an Introduction and an Appendix containing the British Nationality Act, 1948, and the Ireland Act, 1949, ss. 1–5, it consists of three parts. The first (pp. 10–52) contains a summary of British nationality before 1949. The second, in effect, is a detailed and comprehensive commentary upon the legislation of 1948 and 1949 (pp. 53–176). In the third part the status of aliens is described in four short pages. Throughout Mr. Parry has adopted Dicey's method of Rule, Comment, and Illustration which has become so familiar and is particularly appropriate to the subject-matter.

Mr. Parry's task was not an easy one. The provisions of the new legislation are intricate and there is as yet hardly any material available that would throw light on its interpretation. Factual variations are infinite and sorely tax the ingenuity of an author who, it seems, did not enjoy the benefit of access to official records. To a certain extent, it is true, he could derive assistance from Mr. Mervyn Jones's book on *British Nationality* which appeared in 1947 and was unfortunately destined very soon to become largely obsolete. But over a wide field Mr. Parry was required to do spadework. He has carried it out successfully and attractively and in a manner which, for a long time, will provide practitioners with reliable guidance. Neither his sometimes rather heavy style nor the remarkable shortness of the Index—such headings as immunity, option, renunciation, residence do not occur—will affect the practical value of the book.

From the point of view of the international lawyer it would have been desirable if Mr. Parry had somewhat extended the ambit of his work so as to write comprehensively on the nationality of corporations and the effects of statelessness and double nationality in English law. These are topics which are not now dealt with in Dicey and which, therefore, one expects to be discussed in the companion volume. As Mr. Parry emphasizes (p. 160), the effect of the new Act 'will be greatly to increase cases of double nationality'. Yet the only English authority relating to it, *Kramer* v. *Attorney-General*, [1923] A.C. 528, rests on very special facts and leaves many problems unsolved. This case, as well as the cases on statelessness, are briefly referred to by Mr. Parry (p. 9), but the nationality of corporations is ignored altogether for the doubtful reason (p. 5) that the nationality of bodies corporate is essentially a fiction and of no importance to the conflict of laws. These are matters of great practical significance and while admittedly they do not fall within the limits of a mere commentary on the British Nationality Act, 1948, one would expect them to find a place in a work on British Nationality. The very fact that Mr. Parry's work is of such high quality, must make a reviewer regret these omissions and at the same time make it incumbent upon him to refrain from taking up points of detail, but to treat, and recommend, the book as a whole.

F. A. Mann

Les Instructions du gouvernement lors de l'interprétation judiciaire du droit international. By François Payot. Montreux. 1950. 140 pp.

In this work, his doctorate thesis, Dr. Payot seeks to show that the influence of the Executive in matters of international law over the judiciary in England and the United States has increased, is increasing, and ought to be abated. He sees this influence exerted through Certificates of the Foreign Office (and other Ministries) and through 'Suggestions' of the Department of State. He considers that the courts are not always fitted to deal with questions of international law, seeing that they have not been created and organized to that end. They are often swayed by purely national considerations which stand in the way of an harmonious development of international law. It may be for this reason that many writers do not consider the decisions of national courts as being a source of international law.

Dr. Payot develops his theme by examining the practice of first the English and then the American courts in cases involving international law. He examines the doctrine, found in Blackstone and declared by Lord Mansfield in *Triquet* v. *Bath* (1764), 3 Burr. 1478, that the law of nations is part of the law of England, and traces the growth of the habit of the English courts of applying to the Executive for information in cases involving claims for diplomatic privilege during the nineteenth century. Then in *The Charkieh* (1873), 4 A. & E. 59, the Court sought such assistance in the case of a ship alleged to belong to a sovereign prince; and in *The Parlement Belge* (1879), 4 P.D. 129, the binding force of a declaration by the Crown was first debated—and accepted. That was in the Court of Appeal, which again declared itself bound by a communication from—this time—the Secretary of State for the Colonies, in *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149. The House of Lords did not have to deal with the question until *Duff Development Co.* v. *Government of Kelantan*, [1924] A.C. 797; then Cave, Finlay, Dunedin, Sumner, and Carson LL.J. explained at length why they considered themselves bound by a letter from the Colonial Secretary informing them about the status of Kelantan. As, however, the author points out, for all their unanimity their Lordships could find no juridical explanation for the binding nature of the letter. One based it on respect for the work of the Sovereign, another on the avoidance of 'an undesirable conflict', and others on the need to obviate 'chaos and confusion'. The House of Lords met the same problem with regard to the Certificate of the Foreign Office in *Engelke* v. *Musmann*, [1928] A.C. 433, and again gave its sanction to the practice of accepting such a Certificate as binding. Dr. Payot, however, considers the reasons invoked by the Law Lords for such a practice both dangerous and vague and 'tending to ascribe judicial attributes to the Executive'. This, he says, detracts from a sound administration of justice seeing that the decisions of the Executive are governed by political and opportunist considerations. The formula of Shadwell J. in *Taylor* v. *Barclay* (1828), 2 Sim. 213: 'It appears to me that sound policy requires that the Courts of the King should act in accordance with the Government of the King', was echoed by Farwell J. in *Foster* v. *Globe Venture Syndicate*, [1900] 1 Ch. 811, 814: 'sound policy appears to me to require that I should act in unison with the Government'; and again by Lord Lawrence in *The Fagernes*, [1927] P. 311, 329: 'It is highly expedient if not essential that in a matter of this kind the Courts of the King should act in unison with the Government of the King.' But in two cases in 1939—*Kawasaki K.K. of Kobe* v. *Bantham*, [1939] 2 K.B. 544, and *The Arantzazu Mendi*, [1939] A.C. 256, the Foreign Office refused to give the guidance requested of it and the House of Lords was thrown back on its own resources. The Executive supplied the Court with information as to facts of the international situation—the existence of a state of war or the recognition of the

Spanish Nationalist Government—and left the Court to pronounce on the questions of law flowing from those facts. For all that, Lord Atkin said (at p. 264): 'Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.' Eight years later in *Rex* v. *Bottrill*, [1947] K.B. 41, 53, Lord Tucker said that the Certificate of the Foreign Office was conclusive and binding on the Court 'whether questions of fact or law are involved therein'; while Lord Asquith stated (at p. 55) that 'such a certificate is normally conclusive on matters both of fact and law'. Again Dr. Payot points out that there is no stronger juridical principle behind this practice than the doctrine of judicial precedent—a doctrine which carries perhaps less weight with a continental than with an English lawyer. He fears that the practice will lead to domination of the courts by the Executive in matters of international law—to the point of interpreting that law; and that the English courts will lose that independence which has permitted them to contribute so largely to the science of international law. But he takes comfort from the case of *Murray* v. *Parkes*, [1942] 2 K.B. 123, where the Court without consulting the Government decided that Ireland had not seceded from the Commonwealth.

Dr. Payot next examines the ideas of act of state in English law, and reminds us that to establish if a state or a person is independent is clearly to establish a fact; but to decide if a state or a person is sovereign is to decide a point of law. The juridical appreciation of a fact is a question of law which must be left to the unfettered decision of a judge. He suggests that it would be preferable and safer if a court were to accept the declaration of the Government only if it were made prior to the commencement of the litigation in which it is invoked. But this seems hardly practicable, and does not provide for the case where no relevant prior declaration on foreign relations has been made. Intending litigants cannot wait for such a declaration (and on the other hand, if it has already been made, there might be no need for the action to be brought).

A court has neither the right nor the power to bind the state of which it is an organ. It can only involve the state's international responsibility if there is a denial of justice. Dr. Payot contends that a judgment binds only the parties and not the state, even in questions of international law; he shows that denying diplomatic immunities to the Head of a newly recognized state or his representative would not amount to a withdrawal of recognition. But he admits that it would involve the international responsibility of the state of the forum for open violation of international law by one of its judges.

The author next reviews the practice in the United States. There international law was made part of the law of the land by the Constitution of 1787, but that fact itself raises a new problem: the constitutionality of international law (and may lead to the Supreme Court having to pass on the constitutional validity of, for example, a treaty). For this reason the author feels that the American Court will more often than the English prefer to be guided by the Government when the question before it can either be put into the vast category of 'political questions' or become the subject of a Suggestion of the State Department. The Suggestion in *The Exchange* (1812), 7 Cr. 116, where its genesis is seen, was a declaration in general terms on the international law applicable; and it was held by Marshall J. not to be binding on the Court. In those two respects it differed greatly from the Suggestion of modern times. But for many years after *The Exchange* there is no mention by the Supreme Court of a Suggestion; this was the period during which American jurisprudence evolved the doctrine of 'political questions'. That doctrine arose out of decisions on the recognition of new states of South America to which the attitude of the United States courts was similar to that of Lord Eldon in England at that time; it corresponded to the English doctrine of the binding force of the communication of the Executive. The American doctrine is briefly that once the Executive or the Legislature has pronounced itself clearly on a point of international law, the Judiciary must adopt that interpretation so as not to find itself in conflict with these other organs of state. The American judges have, unlike their English brethren, not prayed in aid other juridical or quasi-juridical arguments. They have but to call any given question 'political' and they find its solution in the already declared interpretation of the Executive or the Legislature. They thus, however, in the opinion of the author, show themselves more preoccupied with the national interests of their country than with the impartial interpretation of international law. This leads to a lack of stability in judgments based on political considerations rather than on rules of law.

In 1921, in *Ex parte Muir, The Gleneden*, 25 U.S. 522, the Suggestion returns to the judicial scene, with the formulation of a new rule of procedure. A state which demands immunity from jurisdiction for its public vessels must either become a party to the action or apply to the State Department who will transmit a Suggestion to the Court. For the state merely to appear as *amicus curiae* will not suffice.

Like the binding force of the Certificate of the Foreign Office, that of the Suggestion of the State Department was first canvassed in the inferior Federal courts and also in the superior courts of the states, especially the Supreme Court of the State of New York. Gradually, from about 1940 onward, the Court relinquished its right to give to claims of immunity full and independent consideration, until it treats as 'recognized and allowed' every claim transmitted to it by a Suggestion however vaguely worded. In *The Ucayali, Ex parte Republic of Peru* (1943), 318 U.S. 581, the scope and effect of a Suggestion came for examination by the Supreme Court of the United States. There the Suggestion was that the vessel be declared immune from the jurisdiction and process of the Court. Stone J. responded to this by saying (at p. 588) that 'courts may not so exercise their jurisdiction . . . as to embarrass the executive arm of the government in conducting foreign relations', and Dr. Payot contrasts this with the *dictum* of Sir Wilfred Greene, M.R., in *Kawasaki K.K. of Kobe* v. *Bantham*, [1939] 2 K.B. 544, at p. 552: 'I do not myself find the fear of the embarrassment of the executive a very attractive basis upon which to build a rule of English law.' The author holds that the Supreme Court now bases its judgments not even on established precedent—it bases them on political expediency. It has abandoned its essential function of dispensing justice according to law, and litigants are left to seek the aid of the Government who will decide their cases 'diplomatically'. For the courts of New York State, the Department of State was an intermediary who transmitted claims for immunity for them to decide on. In the eyes of the Supreme Court, the Court itself is an intermediary who makes known to the parties the will of the Government. For the future, he suggests, the Department of State will take upon itself the task of deciding whether any given court should exercise jurisdiction in cases involving claims of immunity. Dr. Payot asks whether the Supreme Court has not violated the Constitution in thus abdicating a part of its function. He hopes that one day the American courts will fix with precision the limits of the doctrine of political questions and the scope of the Suggestions of the State Department. The result will be greater security for litigants and better interpretation of international law. He then argues thus: American courts are perhaps overly concerned to give judgments in harmony with the policy of their country. The risk of political evils resulting from judgments of national courts is not great. Cases of denial of justice are in practice rare, and a diplomatic 'incident' due to the judgment of a national court seems an unlikely event. Should such a judgment give a foreign state cause for complaint, which would happen infrequently if judgments were given according to law, then complaint would indeed lie to the Department of State. But that is insufficient reason for the courts to follow so closely the political opinions of their Government. It were better for the courts to treat Suggestions as such and as aids to justice and not as something binding them automatically. Collaboration between the organs of government is a good thing, but Dr. Payot protests that it does not necessarily imply the subjection of one organ to another. The Judiciary ought to retain the power to assess the value of communications from the Executive rather than to consider them as providing a definitive answer to the question raised. If they continue to submit thus to the instructions of their Government, the author fears that courts will come to be regarded by other states as the mouthpiece of their Government. Such a new function of the Judiciary could become very embarrassing for the Executive.

Dr. Payot is to be complimented on his grasp of those features of English law which differ from continental systems. His translation of extracts from judgments—the English originals of which are usefully subjoined as footnotes—are, so far as a foreigner can tell, accurate and elegant. If he appears over-anxious for the fate of litigants who, despite all the perils he has charted for them, continue to embark undeterred on litigation both in England and in the United States, that is a good fault. It invigorates a useful and valuable study on the recent increase of the power of the Executive over the Judiciary.

A. B. Lyons

Traité de Droit des Gens. By Robert Redslob. Paris: Recueil Sirey. 1950. 473 pp.

A treatise on the whole field of international law and its historical development in some 450 pages is, in itself, an achievement. Moreover, there is within the scope of this work no serious fault of balance. If no topic is treated in detail, the main aspects of the major subjects of international law are adequately discussed. Necessarily, the textual treatment is somewhat didactic. When the author deals with controversial topics such as international personality, the reader might be better served by a discussion of the opposing views on the subject, and by references to some of the case law. But the book never becomes a mere statement of opinions. The views stated in the text are adequately related to treaties, state practice, and legal decisions supporting them. Moreover, although views of international law differing from those of the author are not fully discussed in the text, the bibliography at the end of the work contains ample references to works propounding them.

Professor Redslob proves himself a staunch and consistent Dualist. International law, in his view, is a law between states only. It is different in essence from municipal law, being a law of co-ordination, not of authority. When these views lead him to assert, for instance, that the coercive power of the League of Nations 'n'appartient plus au cadre du droit des gens' although 'elle est issue de l'ordre international' (p. 438), they give the impression of some artificiality. But, as a rule, the author propounds his thesis with force and ingenuity. The Nuremberg Trial, for instance, is dismissed as being a national trial for offences which, by the incorporation of the Briand-Kellogg Pact and the Hague Conventions in national law, were criminal though not made punishable by national law.

The most disappointing part of the book is that covering the laws of war and neutrality. Professor Redslob divides that part into two sections. The first deals with the classical law, exemplified mainly by the Hague Conventions. In the second, entitled

'Le Declin', the author details the departures from classical law in two world wars. No doubt the violations, not only of individual rules of war, but of the fundamental principles underlying the law of war, were many and serious. But such a treatment is not merely a note of despair; it stresses one aspect of modern development to the exclusion of all others. Factors such as the increasing contribution of the civilian population to the war effort, the air-weapon, the new conditions of sea warfare, detailed by Professor Redslob as causes and signs of *le declin*, probably deserve to be treated more thoroughly with a view to ascertaining the limits within which they are compatible with the fundamental principles of the law of war. Moreover, the trials of war criminals, whether they be regarded as an international or a national exercise of jurisdiction, constitute an impressive affirmation of the continued acceptance of the laws of war. Yet Professor Redslob does not mention them in the chapters on the law of war.

This is not intended to be one of the great treatises of international law. But it is competent, clearly written, and within its limitations, comprehensive. As such, it is a useful tool for the international lawyer.

F. MORGENSTERN

Handbuch des Internationalen Privatrechts. By ADOLF F. SCHNITZER. Third edition. Basle: Verlag für Recht und Gesellschaft. 1950. xxii+897 pp.

Nothing illustrates better the favourable reception which has been accorded to this treatise than the fact that within six years yet another edition was called for. No substantial changes have been made, but each chapter has been revised, brought up to date, and rearranged. Compared with the first edition in 1937, the work has gained not only in depth but also in breadth. It now constitutes the complete European counterpart to Rabel's monumental, but as yet unfinished, treatise. Based upon Swiss law, the work surveys the practice of the leading European countries in matters of private international law, including treaties, and provides a full guide to the relevant literature. The author's main tenets were discussed when the second edition was reviewed (*Journal of Comparative Legislation*, Third Series, 30 (1948), p. 104). They are free from theoretical axioms and follow the modern pragmatical tendency of the nationalist school. The author has not found it necessary to modify them, even where, as in his approach to secondary characterization, his own view is not free from criticism, seeing that he understands by secondary characterization a number of situations which concern among others the characterization of connecting factors and the rule in *Armitage* v. *A.G.*, [1906] P. 135.

Notable additions are to be found in the chapters on the relation between international law and conflict of laws, nationality, public policy, presumptions of death, corporations, divorce, matrimonial property relations between spouses, revocation of wills and immovables. The second volume now contains an interesting chapter on nationalizations and includes a number of topics which have been taken over from the same author's book on *International Commercial Law*. Further, the chapters on procedure have been enlarged, thus adding to the practical value of the work. Finally, a chapter on the effect of war on private law relations has been added which is principally concerned with an analysis of the practice of states during and after the two world wars.

English and American private international law do not figure largely in what is a treatise on Swiss law in the first place and, in the second place, on continental private international law. As may be expected, the author uses his sources skilfully and, on the whole, accurately. Nevertheless, in a treatise which marshals its materials authoritatively, the following improvements appear indicated: The suggestion that in English law wills and torts are usually contrasted (p. 130) is obscure. The Foreign Law Ascertainment Act, 1861 (p. 171), has remained a dead letter. According to Cheshire (*Private International Law*, 3rd ed., p. 425) British Consular authorities are prepared to issue *nulla osta* certificates or *certificats de coutume* to British subjects who marry abroad (p. 319). *Wolfenden* v. *Wolfenden*, [1946] P. 61, is an authority on the validity of common-law marriages in China, not on Gretna Green marriages (p. 330, n. 61). *Robert* v. *Robert*, [1947] P. 164, concerns jurisdiction in proceeding to annul a marriage, and not in divorce (p. 368). Moreover it was overruled in *De Reneville* v. *De Reneville*, [1948] P. 100. The summary of *Armitage* v. *A.G.*, [1906] P. 135, does not bring out the special facts and problems of this case (p. 369). In this connexion a reference to Morris in *Canadian Bar Review*, 24 (1946), pp. 73–86, would have been useful. The assertion that s. 6 of the Matrimonial Causes Act, 1937 (now Matrimonial Causes Act, 1950, s. 7), permits the automatic conversion of a decree of judicial separation into a decree of divorce is not accurate (p. 381). The bare statement that bastardy orders are granted by English courts (p. 435) conceals the great difficulties which arise out of the strictly territorial character of the proceedings, of which *O'Dea* v. *Tetau*, [1951] 1 K.B. 184, is the latest example. The summary of the English rules of private international law relating to formalities of wills is a little misleading (p. 478).

These observations are not designed to cast any reflections on a treatise which is not only the standard work on Swiss private international law but is a mine of information on all questions of European private international law and a source of inspiration to all students of the subject.

K. Lipstein

The Law and Custom of the Sea. By H. A. Smith. Second edition. 1950. London: Stevens & Sons Ltd. Published under the auspices of the London Institute of World Affairs. ix+216 pp. 12*s.* 6*d.*

As was stated in the Preface to the first edition, the primary purpose of this book is to give officers of the Royal and Merchant Navies an introduction to the law of the sea. This purpose the book fulfils admirably, but it also does much more than that. Although references to legal authorities are necessarily kept to a minimum, the lawyer, too, will find the book itself a valuable work of reference. All aspects of the law of the sea, during both peace and war, are dealt with in a thoroughly practical manner which always relates law to policy and explains with great clarity the historical background to the present rules.

Professor Smith does well to emphasize that 'the question of the proper method of drawing the base line is hopelessly confused with the question of the width of the territorial belt' and he does his best to distinguish the two entirely separate problems. His treatment of the question of the width of the territorial belt is in accordance with the latest researches on this subject. His explanation of the method of drawing the base line is necessarily more speculative, although he puts forward a formula which consists of a combination of the 'double radius rule' and the method of the 'common tangent'.

Professor Smith is on surer ground when, dealing with so-called 'contiguous zones', he demolishes the argument that a state is entitled to establish zones of varying width for different purposes for the undoubtedly correct reason that 'Every State possesses sovereignty over its own territorial belt. Since it is essential that all frontiers, whether on land or at sea, should be certain and definite, all rights which depend for their exercise upon territorial sovereignty must be valid up to a given line and there stop.' On the other hand, 'up to a reasonable distance outside territorial waters', he allows the littoral state to exercise jurisdiction in the interests of security and order. Professor Smith's chapters containing advice to ships' captains about their legal rights and duties when in foreign ports or passing through foreign territorial waters are undoubtedly among the most useful in the entire book. The chapter on 'The High Seas', after a short historical introduction, deals briefly but well with the *Lotus* case, piracy, self-defence, hot pursuit, the *Behring Sea* case, the slave trade, and the international regulation of maritime traffic and communications, and space is found to include a reference to the latest developments connected with the continental shelf.

With regard to the law of war Professor Smith adheres to the view that 'the decisive break with the traditional law came in 1914 and 1915, when it was decided on both sides that the theory of "reprisals" afforded a means for escaping from the trammels of law'. Few will be disposed to challenge this contention. The book therefore contains an extremely useful analysis, article by article, of the Declaration of London as well as a résumé of some of the Orders in Council issued during the First World War. Although Professor Smith rightly gives pride of place to the developments in 1915 with regard to the law of blockade and contraband and the vexed question of 'retaliation in naval warfare', he includes a useful discussion on more recent incidents such as the cases of the *Asama Maru*, the *Graf Spee*, and the *Altmark*. Professor Smith is of the opinion that aircraft, when operating at sea, are entirely bound by the rules of naval warfare, although he concedes that in both wars 'reprisals' have played havoc with this rule. He regards compulsory deviation of prizes for the purpose of search in port as an established right and permits aircraft to exercise it as well as vessels. A feature of the second edition is the inclusion of a new chapter on 'The Responsibility of the Individual'. Professor Smith does not hide his anxiety, or that of the officers for whom he writes, at the implications of some of the decisions of the Nuremberg tribunal. The trouble, he says, stems from the fact that 'reprisals' have become the rule rather than the exception in naval war. The result has been 'to destroy the conception of an objective law of war', with the further consequence that officers carrying out the orders of one government, these orders being justified as 'reprisals', are almost bound to be found by war crimes tribunals of the enemy to have violated the law of war since such tribunals, while upholding the acts of their own governments, will condemn the 'reprisals' as illegal. The Judgment of the Nuremberg tribunal in the case of Doenitz was not, however, as crudely simple as this. Rather, as the author points out, it went to the opposite extreme of being so confused that it is impossible to tell exactly on what grounds Doenitz was condemned, although it does seem that, if both sides actually practise precisely the same illegal acts (as opposed to merely intending to practise them), if for instance the submarines of both sides sink vessels at sight without warning and do not attempt to rescue the crews, then a valid defence has been made out on that particular charge. An even more difficult question than that of 'reprisals' is the question whether 'superior orders' constitute a defence to a charge of 'war crimes'. Professor Smith discusses with undisguised anxiety the 1944 amendment to the *Manual of Military Law*, Article 8 of the London Charter (1945) concerning 'superior orders', as well as the *Peleus* and *Jaluit Atoll* cases, and he considers it beyond dispute that Article 6 of the London Charter, defining 'crimes against peace', was a retrospective innovation. The conclusion that Professor Smith draws from this survey is that in future wars officers of all ranks who carry out the orders of their superiors will do so at their peril, whilst high-ranking officers will stand in even greater danger. 'Such officers', he says, 'should clearly understand that the performance of their duties at a high level, even when limited by the strictest professional standards, may now expose them to the risk of being hanged.' And, to add insult to injury, 'it is enough to say that officers cannot count on escaping punishment merely on the ground that what they did was perfectly lawful at the time'. The reviewer can only speculate what opinion of international law will be formed by those officers to whom this book is dedicated as 'an introduction to further study'.

D. H. N. Johnson

A Study of Statelessness. United Nations Department of Social Affairs, U.N. Publications Sales No.: 1949.xiv.2. 190 pp. His Majesty's Stationery Office. 9*s*.

This publication incorporates two reports which were prepared by the Secretariat of the United Nations at the request of the Economic and Social Council. Part 1 deals with the improvement of the status of stateless persons; Part 2 is concerned with the question of the elimination of statelessness. The Economic and Social Council has in the meantime taken action on these reports and the recommendations contained therein. As to the improvement of the status of stateless persons, that action resulted in the establishment of a United Nations High Commissioner's Office for Refugees and the preparation of a Convention relating to the Status of Refugees and a Protocol relating to the Status of Stateless Persons. The question of the elimination of statelessness has been referred to the International Law Commission.

A few words on the terminology used in this publication appear necessary. A passage in the Introduction states as follows: 'a considerable majority of stateless persons are at present refugees. These refugees are "*de jure*" stateless if they have been deprived of their nationality by their country of origin. They are "*de facto*" stateless persons if, without having been deprived of their nationality, they no longer enjoy the protection and assistance of their national authorities.' Consequently 'racial, religious or political persecution' and 'mass emigration of nationals caused by changes in political or social system' are mentioned among the causes of statelessness in the second part of the paper, although these are political and social phenomena which, by their nature, cannot be eliminated by the normal methods of international law.

From the legal point of view, the terms '*de jure*' and '*de facto*' stateless are probably misleading, as the qualifying adjectives are not related to nationality or lack of nationality, but to one of its functions, namely, the diplomatic protection enjoyed by persons possessing a nationality. It would be more precise to speak of 'unprotected persons', thus including both persons devoid of nationality, i.e. stateless persons, and persons who, though having a nationality, are devoid of the diplomatic protection of the government of their country of nationality, i.e. refugees.

In the first part, the most interesting is the chapter devoted to the position of stateless persons whose status has not been determined. The function of nationality in international law has not so far been thoroughly investigated by writers. Nationality is usually described as the link between the individual and international law, though it is protection by a subject of international law rather than nationality which provides that link. The study makes the negative side most apparent, as it authoritatively describes—the Secretary-General acknowledges the collaboration of the International Refugee Organization in the preparation of the study—the numerous disabilities from which unprotected persons suffer owing to the absence of that link. It presents an illuminating and distressing picture of the precariousness of the status of unprotected persons.

The next chapter deals with attempts to improve the position of stateless persons. The various international organs created for the protection of refugees and the attempts to regulate their status by treaty are surveyed briefly. The last chapter is devoted to the means of improving the position of stateless persons. Based on the provisions of pre-war conventions and on practical experience, it contains judicious recommendations for the desirable standards which should be established for the enjoyment of individual civil rights by unprotected persons. Most of these suggestions have found their way into the draft Convention relating to the Status of Refugees which is to be considered by a Conference of Plenipotentiaries in May 1951.

The second part, 'The Elimination of Statelessness', covers better trodden ground. The subject was examined by the Committee of Jurists which prepared the Hague Conference for the Codification of International Law, and has frequently attracted the attention of writers on international law. The merit of this study lies in the fact that it incorporates in the comparative survey of nationality laws more recent legislation—most of the publications in this field cover only pre-war legislation—as well as treaties concluded after the last war. The paper rightly distinguishes between the elimination of the causes of statelessness and the reduction of the number of existing cases of statelessness.

The obstacles which stand in the way of the abolition of statelessness are more of a political than of a legal nature. If statistics were available they would probably show that the number of cases of statelessness which are due to conflicts of nationality laws is far smaller than the number of those which have been caused by unilateral deprivation of nationality by states, or by territorial changes. The instruments drawn up by the Hague Conference merely attempt to reduce statelessness caused by conflicts of law. The effects of these instruments have been indirect rather than direct in that they have influenced municipal legislation; the progress made with their ratification has not been encouraging.

Recent nationality legislation shows an increasing trend to resort to denationalization for political reasons, and it seems unlikely that states would be prepared to renounce this weapon by treaty or on the basis of recommendation. Territorial changes are not necessarily based on treaty, and even when they are, international organizations can do no more than recommend model provisions for such treaties in order to avoid the creation of statelessness in consequence of changes of sovereignty.

Cases of statelessness arising from the interpretation and application of treaties, whether connected with territorial changes or not, might well be reduced by international arbitration, as is shown by the example of the Arbitral Tribunal for Upper Silesia established by the Geneva Convention of 1922. However, none of the Peace Treaties concluded after the Second World War provide for arbitral tribunals. The Hague Conference has shown that a single convention for the elimination of statelessness as a result of conflicts of law may, in view of the great diversity of nationality laws, either have to be so limited as to be of little value, or else may stand little chance of wide acceptance. The method of several model conventions which could be adopted by groups of states with similar nationality laws has been recommended by the International Union for Child Welfare in a pamphlet worth reading (*Stateless Children*, Geneva, 1947).

It seems difficult to dissociate questions of nationality from the functions of nationality, and to treat the problem of the abolition of statelessness in isolation. Even if 'the right of the individual to a nationality', which has been so solemnly proclaimed in the Universal Declaration of Human Rights, could be implemented, it would only be beneficial if the entitlement of the individual to the attributes of nationality were ensured by international safeguards; otherwise abolition of statelessness *de jure* might merely lead to an increase of statelessness *de facto*. It might cure the symptoms of the disease but not the disease itself.

The Secretariat of the United Nations has done well in making this study accessible to a wide public. Both parts are provided with a number of annexes which contain the most important international instruments relevant to the subject-matter. In this way the publication may prove a useful handbook for any lawyer who is interested in these problems.

P. WEIS

Völkerrecht. By PROFESSOR ALFRED VERDROSS. Second edition revised and enlarged. Vienna: Springer Verlag. 1950. xviii+508 pp. £3. 6*s*. 6*d*.

This long-awaited second edition of Professor Verdross's text-book fulfils—and exceeds—expectations. In this edition, perhaps in an even larger measure than in any of his previous works, the author combines philosophical treatment with a thorough picture of the practice of governments and courts. Those who still attach importance to the time-honoured—but inaccurate—notion of a fundamental difference in the 'Anglo-American' and 'Continental' methods will derive much enlightenment from a study of this text-book. It abounds in references to and critical examination of judicial decisions. It could be translated into the English language without creating with the English reader the impression that it is a 'continental' book—except, perhaps, for the fact that the bibliography takes fully into account recent literature on the Continent. This applies, in particular, to works in the Italian language. For this and other reasons the book—like those recently re-edited by Professor Fenwick and published by Professor Guggenheim—is 'international' in the best sense of the word. Even in matters such as the provisions of the Charter of the International Military Tribunal on the question of superior orders, with regard to which Professor Verdross is inclined to challenge the conformity of the new developments with what he considers to be established law, he is prepared to consider them as providing a satisfactory basis for future developments. His disagreement with others is as a rule tempered by a full and impartial exposition of the opposing views.

The book is a model of compression. In 500 pages it covers the entire subject of the law of peace and war and of international organization and institutions. Text-books are often eclectic and summary to the point of lacking in literary form. This reproach cannot be levied against Professor Verdross. There will be satisfaction among very many that, in the difficult circumstances of the post-war period, he has been able to give new vitality and usefulness to a comprehensive presentation of his teaching in a field in which he is a master.

H. L.

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